No. 90-1464

FILED
MAR 18 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

VOLKSWAGEN OF AMERICA, INC., AND VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Petitioners,

v.

DOUG ROY, JR., MARSHA ROY, A MINOR, THROUGH HER GUARDIAN AD LITEM, DOUG ROY, JR., AND DOUG ROY, III, A MINOR, THROUGH HIS GUARDIAN AD LITEM, DOUG ROY, JR.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

David M. Heilbron*
Leslie G. Landau
Anne O. Hanna
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

Attorneys for Petitioners

*Counsel of Record

McCutchen, Doyle,
Brown & Enersen
Of Counsel

Herzfeld & Rubin, P.C.
Herbert Rubin
Michael Hoenig
Ian Ceresney
Daniel Gsovski
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

The trial court, after verdict, weighed the evidence, found the jury's verdict contrary to its "overwhelming" weight, found further that the jury was "overwhelmed" by the emotion that "pervaded the case," and ordered a new trial under Federal Rule of Civil Procedure 59. The court of appeals weighed the evidence again, for itself, found that evidence was "substantially balanced" (it did not hear the evidence), found no "evidence" of jury sympathy (it did not see the jury), and reversed the new trial order. In so doing, the court of appeals vacated a second jury's verdict that agreed with the trial court.

This petition presents the following questions.

1. Some courts of appeal permit a trial court to weigh evidence and credibility, and to set aside verdicts the trial court finds against the great weight of the evidence, even though "substantial evidence" supports the verdict. Other courts of appeal forbid a trial court to weigh credibility, and prohibit a new trial order if there is "some support" for the jury verdict. Still others are somewhere in between.

Should the Court clarify the district court's power to grant new trials under Rule 59?

2. Some courts of appeal refuse to review new trial orders based on a trial court's finding that the verdict is against the weight of the evidence. Other courts of appeal reverse such orders only in "extraordinary" circumstances of "clear error." Still other courts of appeal give "strict scrutiny" to such new trial orders, reweighing the evidence for themselves.

Should the Court clarify the circuit court's scope of review of new trial motions?

PARTIES IN THE COURT OF APPEALS

All parties in the court below are identified in the caption of this petition. Petitioner Volkswagen of America is a wholly owned subsidiary of petitioner Volkswagenwerk Aktiengesellschaft. Volkswagenwerk Aktiengesellschaft's subsidiaries, other than wholly owned subsidiaries, are listed below:

Audi AG

VW-Gedas & Co. Projektmanagement OHG

Sociedad Espanola de Automobiles de Tourismo S.A.

Coordination Center Volkswagen SA

Europcar International S.A.

Autolatina Comercio Negocios e Participacoes Ltda

Volkswagen do Brazil S.A.

Autolatina Argentina S.A.

Shanghai-Volkswagen Automotive Company Ltd.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES IN THE COURT OF APPEALS ii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. The First Trial 3

1. The Liability Evidence 4

2. The Damages Evidence 6

B. The New Trial Order 6

C. The Second Trial 7

D. The Court Of Appeals Reweighs The Evidence And Reverses 7

REASONS FOR GRANTING THE WRIT 9

I. SUMMARY OF ARGUMENT 9

II. THE NINTH CIRCUIT'S DECISION REFLECTS A CONFLICT AMONG THE CIRCUITS ABOUT THE SCOPE OF THE DISTRICT COURTS' DISCRETION TO ORDER A NEW TRIAL, AND THE APPELLATE COURTS' POWER OF REVIEW ... 12

A. This Court's Teachings: Trial Courts Are Best Equipped To Rule Based On The Evidence, And Appellate Courts Should Not Second-Guess Them 12

TABLE OF CONTENTS – Continued

Page

B. There Is Conflict Among The Circuits On The Rights And Limits Of The Trial And Appellate Courts In Ruling On And Reviewing New Trial Motions 14

1. The Conflict On The Power Of Trial Courts To Order New Trials 15

a. The Traditional Rule: Trial Courts Can Weigh Evidence And Credibility, Set Aside Verdicts Supported By Substantial Evidence, And Must Do So To Prevent A Miscarriage Of Justice 15

b. The Revisionist Rule: Trial Courts May Not Weigh Credibility, And May Not Set Aside Jury Verdicts Supported By Substantial Evidence..... 17

2. The Conflict On The Scope Of Appellate Courts' Review Of New Trial Orders... 19

a. The Traditional Rule: Appellate Courts Are Ill-Equipped To Weigh Evidence And Credibility, And Should Not Do It 19

b. The Revisionist Rule: Circuit Courts Give The Closest Scrutiny To New Trial Orders Based On Weight Of The Evidence..... 21

C. This Case: The Conflict Within The Ninth Circuit 25

TABLE OF CONTENTS – Continued

Page

1. The Ninth Circuit's History Of Applying The Traditional Rules 25

2. The Ninth Circuit's Departure From The Traditional Rules In This Case 26

a. The Weight Of The Evidence 27

b. Jury Prejudice 28

D. The Court Should Grant Review To Resolve The Conflict 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941) 17, 20, 21

Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176 (9th Cir. 1989), *cert. denied*, 110 S.Ct. 868 (1990) 16, 20, 25, 26

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 10, 14

Anderson v. Bessemer City, 470 U.S. 564 (1985) 20

Barrett v. United States, 423 U.S. 212 (1976) 12

Bevevino v. Saydjari, 574 F.2d 676 (2d Cir. 1978) 16, 17

Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) 18, 27

Bonura v. Sea Land Service, Inc., 505 F.2d 665 (5th Cir. 1974) 19

Borras v. Sea-Land Service, Inc., 586 F.2d 881 (1st Cir. 1978) 17

C.J. Ard v. Southwest Forest Industries, 849 F.2d 517 (11th Cir. 1988) 23

Commissioner v. Bilder, 369 U.S. 499 (1962) 12

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 13, 15, 29

Consumers' Power Co. v. Curtiss-Wright Corp., 780 F.2d 1093 (3d Cir. 1986) 18

Conway v. Chemical Leaman Tank Lines, Inc., 610 F.2d 360 (5th Cir. 1980) 23, 24

Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc., 777 F.2d 485 (9th Cir. 1985) 26

TABLE OF AUTHORITIES – Continued

Page(s)

Cruthirds v. RCI, Inc., 624 F.2d 632 (5th Cir. 1980) .22, 24

Deas v. Paccar, Inc., 775 F.2d 1498 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986) 22, 24

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950) 12

Digidyne Corp. v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985) 26

Evers v. Equifax, Inc., 650 F.2d 793 (5th Cir. 1981) 23

Eyre v. McDonough Power Equip., Inc., 755 F.2d 416 (5th Cir. 1985) 15, 16, 20

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933) 13

Fireman's Fund Ins. Co. v. Aalco Wrecking Co., 466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) 18

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 12

Forrester v. White, 846 F.2d 29 (7th Cir. 1988) 20

Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296 (9th Cir. 1978) 25

Gill v. Rollins Protective Services Co., 836 F.2d 194 (4th Cir. 1987) 16, 17

Goldsmith v. Diamond Shamrock Corp., 767 F.2d 411 (8th Cir. 1985) 18

Hanna v. Plummer, 380 U.S. 460 (1965) 11

TABLE OF AUTHORITIES – Continued

Page(s)

Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977)..... 26

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)..... 11

Katara v. D.E. Jones Commodities, Inc., 835 F.2d 966 (2d Cir. 1987)..... 21

Kearns v. Keystone Shipping Co., 863 F.2d 177 (1st Cir. 1988)..... 15

King v. Exxon Co., U.S.A., 618 F.2d 1111 (5th Cir. 1980).....15, 20

Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365 (9th Cir. 1987).....16, 17, 20, 25, 26

Lind v. Schenley Industries, Inc., 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960).....22, 24

Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162 (4th Cir. 1985).....20

Marks v. United States, 430 U.S. 188 (1977)..... 12

McElroy v. United States, 455 U.S. 642 (1982)..... 12

McGee v. South Pemiscot School District, 712 F.2d 339 (8th Cir. 1983)..... 18

McNeal v. Hi-Lo Powered Scaffolding, 836 F.2d 637 (D.C. Cir. 1988).....19, 22, 28

McWhorter v. Birmingham, 906 F.2d 674 (11th Cir. 1990).....22, 28

Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246 (9th Cir. 1957)..... 25

TABLE OF AUTHORITIES – Continued

Page(s)

Murphy v. Long Beach, 914 F.2d 183 (9th Cir. 1990) 16, 25, 26

Narcisse v. Illinois Central Gulf Railroad Co., 620 F.2d 544 (5th Cir. 1980) 18, 19

Palmer Coking Coal Co. v. Director, Office of Worker's Compensation Programs, 720 F.2d 1054 (9th Cir. 1983) 26

Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co., 846 F.2d 1247 (10th Cir. 1988) 20

Phoenix v. COM/Systems, Inc., 706 F.2d 1033 (9th Cir. 1983) 20, 26

Portage II v. Bryant Petroleum Corp., 899 F.2d 1514 (6th Cir. 1990) 18, 19, 24

Portman v. American Home Prods. Corp., 201 F.2d 847 (2d Cir. 1953) 21

Poynter v. Ratcliff, 874 F.2d 219 (4th Cir. 1989) 20

Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986 (1st Cir. 1978) 15, 18

Roberts v. Consolidated Rail Corp., 893 F.2d 21 (2d Cir. 1989) 21

Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493 (11th Cir. 1987) 18, 23, 24

Roy v. Volkswagen Aktiengesellschaft, 600 F. Supp. 653 (C.D. Cal. 1985) ..... *passim*

Roy v. Volkswagen of America, Inc., 896 F.2d 1174 (9th Cir. 1990) ..... *passim*

Roy v. Volkswagen of America, Inc., 920 F.2d 618 (9th Cir. 1990) 27

TABLE OF AUTHORITIES – Continued

Page(s)

Scarborough v. United States, 431 U.S. 563 (1977) 12

Spanish Action Committee v. Chicago, 766 F.2d 315 (7th Cir. 1985).....15, 20

Spurlin v. General Motors Corp., 528 F.2d 612 (5th Cir. 1976) 22, 24

Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977) 12

Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987) 16

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29 (1944) 18

United States v. Johnson, 327 U.S. 106 (1946) 14

Watts v. Great Atlantic and Pacific Tea Co., Inc., 842 F.2d 307 (11th Cir. 1988).....23, 28

STATUTES AND CODES

28 U.S.C. § 1254(1) 2

Federal Rule of Civil Procedure 59.....3, 9

MISCELLANEOUS

11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 at 48-49 (1973)..... 17

6A J. Moore, *Moore's Federal Practice* ¶ 59.15[3] at 59-309-10..... 14

No. 90-___

In The

Supreme Court of the United States

October Term, 1990

VOLKSWAGEN OF AMERICA, INC., AND VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Petitioners,

v.

DOUG ROY, JR., MARSHA ROY, A MINOR, THROUGH HER GUARDIAN AD LITEM, DOUG ROY, JR., AND DOUG ROY, III, A MINOR, THROUGH HIS GUARDIAN AD LITEM, DOUG ROY, JR.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc. ("Volkswagen"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 16, 1990, as amended on December 17, 1990.

That judgment and opinion reversed the trial court's grant of a new trial. The trial court had found that the

verdict was "against the great weight of the evidence" and "swayed by emotion and sympathy," and ordered a new trial to avert "a serious miscarriage of justice." The court of appeals, reading the cold record, substituted its view of the evidence for the view of the trial judge who saw and heard the evidence, live, and reversed. The court of appeals thus vacated the second jury's verdict in favor of defendants below, and reinstated the original jury verdict of $3 million in favor of plaintiffs below, Doug Roy, Jr., Marsha Roy, Shannon Roy and Doug Roy, III (the "Roys").

OPINIONS BELOW

The United States District Court's opinion granting a new trial is reported at 600 F. Supp. 653 and is reproduced as Appendix A. The court of appeals' opinion reversing the district court's grant of a new trial is reported at 896 F.2d 1174 and is reproduced as Appendix B. The court of appeals' order amending this opinion is reported at 920 F.2d 618 and is reproduced as Appendix C.

JURISDICTION

The court of appeals entered judgment on February 16, 1990. It denied a timely Petition for Rehearing and amended its earlier opinion on December 17, 1990. The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns Federal Rule of Civil Procedure 59(a), which provides in pertinent part:

Rule 59. New Trials; Amendment of Judgments (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . .

STATEMENT OF THE CASE

This diversity action arose out of a single-vehicle accident in 1982, when the Roys' 24-year old 1958 Volkswagen van rolled over. The Roys alleged that the rollover and subsequent fire were proximately caused by a design defect in their vehicle.[1]

A. The First Trial

Because of the gruesome injuries sustained in the accident, particularly by the plaintiffs' young son, Volkswagen sought a bifurcated trial to avoid prejudicing the jury's liability determination. The district court declined to bifurcate the trial. With liability and damage evidence both before it, the jury returned a $3 million verdict in the Roys' favor.

---

[1] The accident occurred after plaintiffs' van developed a fuel-line problem, which Mr. Roy "fixed" himself. He removed the gas cap, inserted one end of a rubber hose into the open fuel tank, packed rags around the hose in the open filler nozzle, ran the hose along the outside of the van, and connected the other end of the hose to the fuel pump. When, driving the van, Mr. Roy swerved left and the van rolled, gasoline spilled and ignited, and the van caught fire.

1. The Liability Evidence

Liability turned on the cause of the rollover. This in turn hinged on where the van was when it started to roll. It was "essential to plaintiffs' case" that the vehicle began to roll on the smooth pavement of the highway, and did not trip on the soft gravel on the shoulder alongside of it. *Roy v. Volkswagen Aktiengesellschaft*, 600 F. Supp. 653, 655 (C.D. Cal. 1985) ("*Roy I*") (App. 5A).[2] Plaintiffs' theory was that Mr. Roy swerved left to avoid a dog, and that the van started its roll on the smooth pavement. *Roy I*, 600 F. Supp. at 654 (App. 5A). Volkswagen's theory was that Mr. Roy fell asleep at the wheel, let the van drift onto the unimproved shoulder of the highway and, when he woke up with a start, swerved left to try to return to the highway. The front wheels dug deeply into the soft dirt shoulder, which was two to three inches below the pavement, and the van "trip[ped]." *Roy I*, 600 F. Supp. at 654 (App. 5A).

Plaintiffs themselves could shed no light on this critical issue. Mr. Roy, who was driving, conceded "that he did not know whether the vehicle ever left the paved surface," or not. *Roy II*, 896 F.2d at 1178 (App. 16B). Thus, to support their theory, plaintiffs offered two "eyewitnesses," who claimed to have seen the van begin to roll

---

[2] *See also* CT 290 (Judge Wilson's decision) (plaintiffs "never indicated in any way . . . that they could win if . . . Mr. Roy drove off the road"). It was undisputed that a vehicle that rolls when tripped is not defective. *Roy v. Volkswagen of America*, 896 F.2d 1174, 1178 (9th Cir. 1990) ("*Roy II*") (App. 16B) ("Both parties agree that the fact that a vehicle rolls after being tripped is not indicative of a design defect"); *Roy I*, 600 F. Supp. at 654-55 (App. 5A) ("Even plaintiffs' experts have admitted that the fact that a vehicle rolls after being tripped is no indication that the design of the vehicle is defective").

while still on the pavement. These "eyewitnesses," however, were some 2,000 feet (about the length of seven football fields) away from the accident. Indeed, as the court of appeals would later note, plaintiffs themselves "did not dispute" that their "eyewitnesses" could not see the road markings from their vantage point. *Roy II*, 896 F.2d at 1168 (App. 17B).

For its part, Volkswagen presented five separate categories of physical and testimonial proof, which both undermined the credibility of plaintiffs' "eyewitnesses" and independently established that the vehicle began to roll over only after it had left the road. The district court found this evidence so powerful that it refused a jury view of the accident scene as not "worth a trip." (RT 1717-20)[3]

---

[3] Volkswagen's evidence was: (1) A surveyor who surveyed the terrain said that because of the road elevation and crown of the road surface, the eyewitnesses could not see the lane markings, road surface, or the gravel shoulder. (RT 1220-21) (2) Three policemen, who had stood where the two eyewitnesses had been, swore to exactly the same thing. (RT 1027-28, 1120-23, 980-82) (3) Videotapes taken at the scene "demonstrate[d] clearly that because of the nature of the terrain [those eyewitnesses] would have been unable to judge from their point of observation whether the van commenced its roll on the pavement or off on the shoulder." *Roy I*, 600 F. Supp. at 655 (App. 6A). (4) Photographs taken by the police "immediately after the accident" "clearly" showed the tracks of the van on the gravel, "precisely as defendants . . . contended." *Roy I*, 600 F. Supp. at 655 (App. 5A). (5) There were no marks on the highway or "physical evidence of any kind . . . to support plaintiffs' theory." *Roy I*, 600 F. Supp. at 655 (App. 6A); *see also* RT 1020-25.

2. The Damages Evidence

In contrast to their liability case, plaintiffs presented overwhelming and heartbreaking evidence of their injuries, centering on those sustained by their youngest child. The jurors saw "many graphic and explicit photographs" of little Doug Roy, III's burns, his resulting disfiguring scars and the many operations he had endured and would endure. *Roy I*, 600 F. Supp. at 655 (App. 6A). This presentation culminated as the boy was undressed before the jury on his doctor's knee to display his wounds. (RT 706-36) The jury returned a $3 million verdict in favor of the Roys.

B. The New Trial Order

Volkswagen moved for a new trial under Rule 59, and the district court granted the motion. The trial judge found the verdict contrary to the "great weight of the evidence" and that "emotion . . . pervaded the case" because of the jury's exposure to evidence of the little boy's "horrible" burns, and "obscure[d] the issue of liability." *Roy I*, 600 F. Supp. at 653, 655 (App. 2A, 6A).[4]

As to the cause of the accident, the trial court reviewed the evidence – the "eyewitnesses' " testimony, the police testimony, the surveyor testimony, the photographs, the videotapes and the physical evidence. The court judged that the "eyewitnesses" could not have seen what they said they saw in light of the undisputed physical facts at the scene of the accident, and that the "great weight of the evidence" defeated the Roys' theory. *Roy I*, 600 F. Supp at 654-55 (App. 5A-6A). P. 5, above.

---

[4] The district court also found no design defect, but that finding is not at issue here.

As to sympathy, the trial judge determined, based on what he observed and felt in the courtroom, that "emotion . . . pervaded this case" and "overwhelmed the jury." The little boy's "horribly disfiguring scars" made "most difficult a dispassionate evaluation of the evidence." *Roy I*, 600 F. Supp. at 653, 655 (App. 2A, 6A). The court found the verdict "so contrary to common sense and the overwhelming weight of the evidence that [the district court] cannot in good conscience permit it to remain." *Roy I*, 600 F. Supp. at 653 (App. 2A). "[T]o allow the verdict to stand," the court concluded, "would constitute a serious miscarriage of justice." *Roy I*, 600 F. Supp. at 655 (App. 6A-7A).

C. The Second Trial

The second trial was tried before a new judge. He bifurcated the liability and damages issues, because he concluded that viewing the horrible injuries would likely sway the second jury with emotion and make it unable to render a fair decision. (II RT 5-7)

On essentially the same liability evidence, but without the emotionally wrenching display of the child's injuries, the second jury reached the same conclusion as the original trial judge, and unanimously returned a defense verdict.

D. The Court Of Appeals Reweighs The Evidence And Reverses

On appeal, the court of appeals decided the verdict "did not necessarily indicate that the jury's decision was born of sympathy" and reweighed the evidence itself, making credibility judgments although it had not

observed the witnesses or their demeanor, or even, apparently, seen the trial exhibits.[5] Based on its *de novo* assessments of sympathy, credibility, and weight, the court of appeals reversed the new trial order, vacated the second jury's verdict, and reinstated the first verdict.

As to sympathy, the court of appeals did not see the "horribly disfigured" child or the juror's reactions as he was undressed before them. Indeed, the court of appeals apparently did not even see any pictures of him (n.5, above). Nor did the court of appeals consider that the second jury, hearing that same evidence (without viewing the child's horrifying burns), returned a defense verdict. The court of appeals simply declared that there was no "evidence" of jury prejudice, so the jury was not "necessarily" unable to "put aside its personal feelings during its deliberations and decide the case as the evidence and the law dictated." *Roy II*, 896 F.2d at 1179 (App. 18B).[6]

As to the evidence, the court of appeals acknowledged that "the Roys did not dispute that the highway markings were not visible from the vantage point of the eye witnesses." *Roy II*, 896 F.2d at 1178 (App. 17B). The

---

[5] When the court of appeals issued its opinion, all the exhibits from the first trial were still in the district court clerk's office, and there was no record that they ever had been sent to the Ninth Circuit.

[6] The panel noted that the jury did not award punitive damages and that the award was in line with the medical evidence. But the award of millions of dollars in compensatory, rather than punitive, damages, did not show that the jury was dispassionate in considering evidence of liability. Indeed, the second jury's verdict – reached without the "graphic" evidence of the child's "horribly disfiguring scars" – showed the opposite. *Roy I*, 600 F.2d at 655, 653 (App. 6A, 2A).

court of appeals nonetheless chose to credit their testimony.[7] In so doing, the court of appeals disregarded the videotapes which the trial court had found "demonstrated clearly" plaintiffs' witnesses' unreliability (so much so that a jury view was unnecessary), and made no mention whatever of the physical evidence the trial court had found "thoroughly inconsistent" with plaintiffs' theory. *Roy I*, 600 F. Supp. at 655 (App. 5A-6A). Based on its reweighing of the evidence, the court of appeals found that each side "presented persuasive evidence," that the evidence was "substantially balanced," and that Volkswagen's evidence "did not . . . preponderate." *Roy II*, 896 F.2d at 1177, 1179 (App. 15B, 19B). The court of appeals concluded that the district court "abused its discretion in setting aside the jury verdict in the first trial and ordering a new trial." *Roy II*, 896 F.2d at 1179 (App. 19B).

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF ARGUMENT

A substantial conflict now exists among the circuits as to two issues that affect every civil trial in the federal courts: (1) the scope of a district court's power to grant new trials and (2) the standards applicable to appellate review of new trial orders. The conflict is starkly reflected in this case.

Rule 59 of the Federal Rules of Civil Procedure empowers the trial court to order a new trial after a jury

---

[7] To support its decision to credit the testimony of the "eyewitnesses," the court of appeals relied on the changed testimony of one police witness from deposition to trial, *Roy II*, 896 F.2d at 1178 (App. 17B), even though it did not see the witness's demeanor and could not judge the effect, if any, of that attempted impeachment.

verdict. In this Court's words, the "authority to grant a new trial" has been "confided almost entirely" to the trial court's discretion. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). In particular, Rule 59 permits a trial court to grant a new trial when, in its view, the verdict is against the great weight of the evidence and results in a miscarriage of justice. Historically, the courts of appeals have recognized that the district court – which has heard the testimony and seen the witnesses – is best able to protect the interests of justice if accorded wide latitude to judge whether a new trial is appropriate. Orders granting a new trial were, traditionally, rarely reviewed, much less reversed; certainly they were not reversed based on the appellate courts' *de novo* assessment, and weighing, of facts based on a cold record.

In recent years, the courts of appeal have adopted conflicting rules on the powers of trial and appellate courts addressing new trial issues. Some courts of appeals have continued to protect the trial court's wide discretion, and have adhered to the traditional rule of extreme deference to trial court judgments on new trial orders, especially when the trial court's order is based on its assessment that the verdict is against the weight of the evidence. Other courts of appeals have departed from these rules in favor of a so-called "modern trend." These "revisionist" courts, while reciting traditional "abuse of discretion" language, have substantially narrowed the rights of trial courts to grant a new trial, and correspondingly have undertaken virtual *de novo* review. Those "revisionist" courts of appeals have restricted, or taken away, the trial court's right and duty to weigh the evidence and assess the credibility of witnesses upon a new

trial motion, and arrogated to the courts of appeals themselves virtually unreviewable discretion to weigh evidence, assess credibility and reinstate verdicts in cases they have not seen or heard. Some of these "revisionist" courts give stricter scrutiny to new trial orders based on the weight of the evidence than they give to new trial orders based on errors of law. And in this case, the court of appeals went beyond even the bounds of revisionist courts, finding no jury prejudice where it never saw the jury, the evidence, or felt the "emotion" that the trial court said "pervaded the case."

The "revisionist" cases turn the traditional roles of trial and appellate courts upside down, and give to courts of appeals an evidence weighing function no appellate court should have. The "trend" is troublesome. In the last decade, the number of reversals of new trial orders appears to have increased dramatically, especially in cases where the trial court allowed a new trial on grounds that the verdict was against the weight of evidence. The standards vary from circuit to circuit, and from case to case in some circuits. Thus, trial courts in some circuits have rights that trial courts in other circuits do not; and in circuits where the rule is elusive, no trial court knows what discretion it may exercise when it believes it sees a miscarriage of justice. Litigants in turn are left to guess whether a second trial is real or a meaningless exercise.

This Court's guidance is needed to secure a uniform rule on an issue that touches every case tried in the United States district courts. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 700 (1982) (certiorari granted to resolve conflict on application of federal rule); *Hanna v. Plummer*, 380 U.S. 460, 462-63 (1965) (granting certiorari "[b]ecause of the threat

to the goal of uniformity of federal procedure").[8] We ask the Court to grant review.

II. THE NINTH CIRCUIT'S DECISION REFLECTS A CONFLICT AMONG THE CIRCUITS ABOUT THE SCOPE OF THE DISTRICT COURTS' DISCRETION TO ORDER A NEW TRIAL, AND THE APPELLATE COURTS' POWER OF REVIEW.

A. This Court's Teachings: Trial Courts Are Best Equipped To Rule Based On The Evidence, And Appellate Courts Should Not Second-Guess Them.

This court has never addressed the scope of a trial court's power to order a new trial under Rule 59, or the

---

[8] *See, e.g., McElroy v. United States*, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the Circuits on this issue of statutory construction"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (certiorari granted "to resolve a conflict among the Circuits on the appealability question" as to certain district court decisions); *Marks v. United States*, 430 U.S. 188, 189 (1977) (certiorari granted "to resolve a conflict in the Circuits"); *Barrett v. United States*, 423 U.S. 212, 215 (1976) (certiorari granted because of the importance of the issue and because the court of appeals' decision "appeared to have overtones of conflict" with another circuit's decision); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669 n.6 (1977) (certiorari granted where the circuits "have been far from uniform in their treatment of this issue" and certain circuits had taken positions "which appear inconsistent with" the view of other circuits); *Commissioner v. Bilder*, 369 U.S. 499, 501 (1962) (certiorari granted because of a circuit conflict "and the need for a uniform rule on the point"); *Scarborough v. United States*, 431 U.S. 563, 567 & n.4 (1977) (certiorari granted because of "split among the circuits," one circuit being noted as having an intracircuit conflict); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950) (certiorari granted "because of this intracircuit conflict").

scope of the court of appeals' review of such an order. Over the years, however, the Court has expressed its views generally on new trial orders.

Nearly sixty years ago, this Court observed that new trial orders based on the trial court's assessment of the evidence are not reviewable.

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for new trial for error of fact has been settled by a long and unbroken line of decisions. . . . The rule precludes likewise a review of such action by a circuit court of appeals.

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933). Since then the Court has addressed new trial issues from time to time, and has repeatedly stressed that the trial court, which sees a trial as it unfolds, observes the witnesses and hears the evidence, is far better equipped to decide new trial issues than an appellate court, which sees only a cold record. In this Court's words, the trial court "has a feel of the case that no appellate printed transcript can impart":

> Determination of whether a new trial should be granted . . . calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone.

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216 (1947) (holding when JNOV reversed, and trial court has not addressed new trial motion, remand required to give trial court opportunity to address new trial issue). Accordingly, an appellate court's scope of review, if any,

is very limited: "the authority to grant a new trial . . . is confided *almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (holding mandamus inappropriate to review grant of new trial) (emphasis added). Thus, where a new trial has been ordered based on the trial court's review of facts, the only issue is whether some evidence supports what the trial court did; if so, the new trial decision is affirmed.

> [I]t is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact. While the appellate court might intervene when the findings of fact are wholly unsupported by evidence, it should never do so where it does not clearly appear that the findings are not supported by any evidence.

United States v. Johnson, 327 U.S. 106, 111-12 (1946) (new trial order in criminal case). *See also* 6A J. Moore, *Moore's Federal Practice* ¶ 59.15[3] at 59-309-10 ("The rule of [*Johnson*] seems applicable to motions for new trials in civil actions.").

B. There Is Conflict Among The Circuits On The Rights And Limits Of The Trial And Appellate Courts In Ruling On And Reviewing New Trial Motions.

Traditionally, the courts of appeals have followed this Court's description of the proper roles of trial and appellate courts. In the last decade or so, however, the courts of appeals have diverged in the rules applied to trial and appellate courts addressing the new trial issue. Some circuits, and some cases within circuits, continue to adhere to traditional rules of deference to trial court

assessments of the evidence, and continue to give them little or no appellate scrutiny. Other circuits, and other cases within circuits, have begun a "modern" – or, more accurately, revisionist – trend. *Kearns v. Keystone Shipping Co.*, 863 F.2d 177, 178 (1st Cir. 1988). These "revisionist" courts recite the traditional "abuse of discretion" rule, but give it a completely different meaning. They restrict the rights of trial judges to assess the evidence and credibility, and expand the court of appeals' review of the trial judge's evidentiary and credibility conclusions.

The result is conflict among some circuits, and a hodge-podge of standards within others. As a result, a new trial order affirmed in one circuit will be reversed in another, or even in another case in the same circuit.

1. The Conflict On The Power Of Trial Courts To Order New Trials.

a. The Traditional Rule: Trial Courts Can Weigh Evidence And Credibility, Set Aside Verdicts Supported By Substantial Evidence, And Must Do So To Prevent A Miscarriage Of Justice.

Trial courts have a unique "feel of the case," *Cone*, above, 330 U.S. at 216, and are in the best position to judge whether the evidence supports a jury verdict. *See, e.g., Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 991 (1st Cir. 1978) (trial court in "far better position" than appellate court to assess credibility and conflicting testimony); *King v. Exxon Co., U.S.A.*, 618 F.2d 1111, 1116 (5th Cir. 1980) (in affirming trial court's granting of a new trial, appellate court "give[s] great deference to the court's firsthand experience of the witnesses, their demeanor, and the context of the trial."); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 420 (5th Cir. 1985) (same); *Spanish Action Committee v. Chicago*, 766 F.2d

315, 321 (7th Cir. 1985) ("the trial judge, who heard the testimony and conducted all pretrial and trial proceedings, [is] uniquely situated to rule on a new trial motion").

Thus, courts of appeals that adhere to the traditional view[9] hold that trial courts can and should weigh evidence and credibility when determining whether to grant a new trial. *See, e.g., Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 868 (1990) ("For purposes of ruling on [a] motion for new trial, the district court was free to reject [incredible witness'] testimony"); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 420 (5th Cir. 1985) (on new trial motion district court is "free" to "assay the comparative weight of the evidence pro and con"); *Bevevino v. Saydjari*, 574 F.2d 676, 684 (2d Cir. 1978) ("The trial judge is free to weigh the evidence himself and need not view it in the light most favorable to the verdict winner"). Indeed, on motion for new trial, the district court's weighing of evidence and credibility "is not a discretionary task, but a duty." *Swentek v. USAIR, Inc.*, 830 F.2d 552, 559 (4th Cir. 1987). *See also Murphy v. Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990) ("the district judge had the right, and indeed the duty, to weigh the evidence as he saw it. . . . ").

A district court may, under the traditional rule, set aside a jury's verdict that is against the great weight of the evidence, even if the verdict is supported by "substantial evidence." *Landes Construction Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987); *Gill v. Rollins Protective Services Co.*, 836 F.2d 194, 196, 198 (4th Cir.

---

[9] The Second and Fourth Circuits consistently adhere to the traditional approach. The First, Seventh, Ninth and Tenth Circuits adhere to it often but not always. The Fifth Circuit follows it occasionally.

1987); *Borras v. Sea-Land Service, Inc.*, 586 F.2d 881, 886 (1st Cir. 1978); *Bevevino v. Saydjari*, 574 F.2d 676, 683 (2d Cir. 1978). The trial court's right and duty to weigh evidence is central to its power to correct a miscarriage of justice. The correction of a miscarriage of justice does not usurp the jury's role, but is an "integral part of trial by jury":

> [The trial court] does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. . . . If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

Landes, 833 F.2d at 1371-72 (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2806 at 48-49 (1973)). *See also Gill v. Rollins Protective Services Co.*, 836 F.2d 194, 196 (4th Cir. 1987) ("the exercise of this power is not in derogation of the right to trial by jury, but is one of the historic safeguards of that right") (*quoting Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 352-53 (4th Cir. 1941)).

b. The Revisionist Rule: Trial Courts May Not Weigh Credibility, And May Not Set Aside Jury Verdicts Supported By Substantial Evidence.

Circuit courts following the revisionist trend – the Third, Sixth, Eighth, Eleventh and D.C. Circuits, and sometimes the Fifth Circuit – have adopted far more restrictive rules.

Courts applying the "traditional" rule permit trial courts to weigh the witnesses' credibility. P. 16, above.

Revisionist courts often (but not always) hold just the opposite: "A dispute over credibility will not justify a new trial." *Consumers' Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1097 (3d Cir. 1986) (*citing Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978)); *Narcisse v. Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980) ("It is the function of the jury as the traditional finder of the facts, *and not the court*, to weigh conflicting evidence and inferences, and determine the credibility of witnesses") (emphasis added) (citation omitted); *McGee v. South Pemiscot School District*, 712 F.2d 339, 344 (8th Cir. 1983) (on motion for new trial "[t]he trial court may not usurp the functions of a jury. The jury weighs the evidence and credibility of witnesses"); *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985) ("The choice between the two stories was essentially a credibility determination for the jury rather than a weight of the evidence issue"). Some of the revisionist cases cite JNOV cases as the source of the rule. *See, e.g., Narcisse*, 620 F.2d at 548 (*quoting Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), and *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944)); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 186 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973) (*following Tennant*); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523-24 (6th Cir. 1990) (*citing Tennant*).

Courts applying the traditional rule permit trial courts to order new trials when they judge the verdict is against the great weight of the evidence, even where substantial evidence supports the jury verdict. Pp. 16-17, above. Revisionist courts hold just the opposite: "[A]s long as there is *some support* for the jury's decision," the trial court cannot order a new trial. *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1498 (11th Cir.

1987) (emphasis added). *See also Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1524 (6th Cir. 1990) (conditional new trial order reversed where there was "significant evidentiary basis for the jury's verdict"); *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 647 (D.C. Cir. 1988) (reversing new trial order where "there was substantial evidence" supporting jury verdict); *Narcisse v. Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980) (new trial order reversed where jury's first verdict "*clearly within* the universe of possible awards which are supported by the evidence") (*quoting Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 670 (5th Cir. 1974) (emphasis in original)).

Thus, the circuits disagree on the scope of a trial court's power in deciding whether to grant a new trial.

2. The Conflict On The Scope Of Appellate Courts' Review Of New Trial Orders.

There is a corresponding split among the courts of appeals on the scope of appellate courts' review of new trial orders. Traditional courts that recognize the trial court's power to weigh evidence and credibility, and to set aside verdicts supported by substantial evidence, also recognize the appellate courts' inability to weigh the evidence *de novo;* their scope of review is very narrow. In contrast, the revisionist courts that circumscribe the trial court's power expand their own scrutiny to virtual *de novo* review of the facts.

a. The Traditional Rule: Appellate Courts Are Ill-Equipped To Weigh Evidence And Credibility, And Should Not Do It.

Courts adhering to the traditional approach give extremely limited review to new trial orders. The court of

appeals will review a new trial order only in "exceptional circumstances." *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941); *see also Forrester v. White*, 846 F.2d 29, 31 (7th Cir. 1988) (*quoting Spanish Action Committee v. Chicago*, 766 F.2d 315, 321 (7th Cir. 1985) (court of appeals will reverse decision on new trial motion only in "exceptional circumstances.").

Because the trial judge has a unique "feel of the case" (pp. 13, 15, above), "appellate review of a district court's order for a new trial is limited," and "the trial judge's grant or denial of a new trial will not be overturned 'except where exceptional circumstances show a clear abuse of discretion.' " *Forrester v. White*, 846 F.2d 29, 31 (7th Cir. 1988) (*quoting Spanish Action Committee v. Chicago*, 766 F.2d 315, 321 (7th Cir. 1985)). *See also Lindner v. Durham Hosiery Mills, Inc.*, 761 F.2d 162, 168 (4th Cir. 1985) ("[T]he granting or refusing of a new trial . . . is not reviewable on appeal, save in the most exceptional circumstances") (citations omitted); *Poynter v. Ratcliff*, 874 F.2d 219, 223 (4th Cir. 1989) (same); *King v. Exxon Co., U.S.A.*, 618 F.2d 1111, 1115-16 (5th Cir. 1980) (review of new trial order "severely limited").

Specifically, in reviewing new trial orders based on the weight of the evidence, the court of appeals traditionally "may not weigh evidence or assess the credibility of the witnesses." *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987). *Accord Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1251 (10th Cir. 1988). Rather, the court of appeals reviews the district court's decision only for "clear error." *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 420 (5th Cir. 1985); *Phoenix v. Com/Systems, Inc.*, 706 F.2d 1033, 1036 (9th Cir. 1983). *See also Anderson v.*

Bessemer City, 470 U.S. 564, 573-74 (1985) (defining "clear error" on review of court findings of fact: "[i]f the district court's account of the evidence is plausible . . . court of appeals may not reverse").

Indeed, where a new trial is granted on the grounds it is contrary to the clear weight of the evidence, some circuit courts will not review that decision at all. "To the extent that a new trial is sought on the ground that a jury verdict was against the weight of the evidence," the Second Circuit has expressly "disclaimed the authority to review a ruling on such a motion." *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 970 (2d Cir. 1987) (affirming denial of new trial); *Roberts v. Consolidated Rail Corp.*, 893 F.2d 21, 26 (2d Cir. 1989) ("a trial court order granting or denying a motion for a new trial on grounds that the verdict is against the weight of the evidence is not reviewable on appeal"); *Portman v. American Home Prods. Corp.*, 201 F.2d 847, 848 (2d Cir. 1953) (same). *See also Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 354 (4th Cir. 1941) ("The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions.").

b. The Revisionist Rule: Circuit Courts Give The Closest Scrutiny To New Trial Orders Based On Weight Of The Evidence.

In contrast to the "traditional rule" circuits, the revisionist circuits arrogate to themselves an expansive power of review. Far from deferring to trial court fact assessments, or refusing to review them altogether as the Second Circuit does, courts applying the revisionist rule rigorously review new trial orders based on the weight of the evidence.

The revisionist courts do not regard the trial court's check on the weight of the evidence as "an integral part of trial by jury" as the "traditional rule" circuits do (p. 17, above). Rather, the revisionist circuits regard the trial court's new trial power as "intruding upon the jury's function and affecting a litigant's Seventh Amendment rights." *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976). *Accord Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir. 1960), *cert. denied*, 364 U.S. 835 (1960).

The revisionist courts thus give "gradations of scrutiny" to new trial orders, depending on whether the new trial was granted or denied, and if granted, on the grounds for it. *Deas v. Paccar, Inc.*, 775 F.2d 1498, 1503-04 (11th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986). *Accord McNeal v. Hi-Lo Powered Scaffolding*, 836 F.2d 637, 646 (D.C. Cir. 1988).

Ironically, where the district court orders a new trial for "legal error" in the course of the trial, some revisionist courts give little review and "the trial court's decision will ordinarily be affirmed." *McNeal v. Hi-Lo Powered Scaffolding*, 836 F.2d 637, 646 (D.C. Cir. 1988).

Where the district court orders a new trial because "confusing testimony and events created a potential for injustice," the revisionist court of appeals also "will ordinarily . . . affirm[]." *McNeal v. Hi-Lo Powered Scaffolding*, 836 F.2d 637, 646 (D.C. Cir. 1988). For even the revisionist courts recognize that the "trial judge who is actually present at the trial, is best able to determine whether the proceeding has been 'contaminated,' " such as by "prejudicial conduct or pernicious behavior." *McWhorter v. Birmingham*, 906 F.2d 674, 677 (11th Cir. 1990). *See also Cruthirds v. RCI, Inc.*, 624 F.2d 632, 635 (5th Cir. 1980) ("great latitude in the trial court's authority is especially appropriate when the motion cites some pernicious error

in the conduct of the trial. Then the trial court occupies the best vantage from which to estimate the prejudicial impact of the error on the jury.").

The revisionist courts, however, give no such respect to the trial court's first-hand experience with the evidence. Instead, they reserve the strictest scrutiny for new trial orders based on the weight of the evidence – which the appellate courts are least able to judge. *See, e.g., C.J. Ard v. Southwest Forest Industries,* 849 F.2d 517, 520 (11th Cir. 1988) ("stringent" standard of review applied when "district court grants a motion for a new trial based on the weight of the evidence"); *Rosenfield v. Wellington Leisure Prods.,* 827 F.2d 1493, 1498 (11th Cir. 1987) ("we . . . strictly scrutinize orders which *grant* new trials, where the basis for the order is that the verdict is against the weight of the evidence") (emphasis in original); *Watts v. Great Atlantic and Pacific Tea Co., Inc.,* 842 F.2d 307, 311 (11th Cir. 1988) (review "rigorous if the motion is granted rather than denied, and if the basis for the motion was . . . the weight of the evidence"); *Evers v. Equifax, Inc.,* 650 F.2d 793, 796-97 (5th Cir. 1981) ("A somewhat broader review applies to an order granting a new trial as opposed to an order denying such a motion, and the greatest degree of scrutiny is exercised when a new trial is granted on the ground that the verdict is against the weight of the evidence"); *Conway v. Chemical Leaman Tank Lines, Inc.,* 610 F.2d 360, 363 (5th Cir. 1980) (applying "closest scrutiny of the evidence permissible").[10]

---

[10] Some revisionist courts also recognize "gradations in the strictness of [their] review in those instances where the issues are highly complex, being more strict in [their] review when the issues are simple and the outcome largely dependent

(Continued on following page)

In reviewing these new trial orders "strictly" and "rigorously," the revisionist courts of appeals assess the evidence themselves, and weigh it themselves to reach their own conclusion on whether the "great weight" supported the verdict. *See e.g., Cruthirds v. RCI, Inc.*, 624 F.2d 632, 636 (5th Cir. 1980) ("we must review the record carefully to make certain that the district court has not merely substituted its own judgment for that of the jury"); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1524 (6th Cir. 1990) (undertaking "thorough examination" of the evidence); *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 365-66 (5th Cir. 1980) (reviewing evidence in great detail, and deciding "there *is* no great weight of the evidence in any direction") (emphasis in original); *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987) (jury "was free to believe or disbelieve portions of testimony, and it could reasonably have chosen to believe plaintiff's evidence . . . "). In sum, the revisionist courts depart from this Court's teachings on the proper roles of trial and appellate courts. They adopt gradations of scrutiny that are just the opposite of what appellate courts generally do, and that squarely conflict with what traditional circuits do.

(Continued from previous page)

upon the credibility of witnesses." *Deas v. Paccar, Inc.*, 775 F.2d 1498, 1503-04 (11th Cir. 1985); *See also Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90-91 (3d Cir. 1960), *cert. denied*, 364 U.S. 835 (1960); *Spurlin v. General Motors Corp.*, 528 F.2d 612, 620 (5th Cir. 1976). Also, where the trial court grants a new trial based on "a combination of factors, which could have caused the jury to reach a possibly erroneous verdict," some revisionist courts of appeal may allow "wide discretion." *Deas v. Paccar, Inc.*, 775 F.2d 1498, 1504 (11th Cir. 1985).

C. This Case: The Conflict Within The Ninth Circuit.

This case puts the conflict in stark relief. The Ninth Circuit has ordinarily adhered to the traditional rules. But the Ninth Circuit spurned those rules in this case in favor of the revisionist approach – virtual *de novo* review of the trial court's weighing of evidence. As to the jury prejudice issue, the court of appeals went beyond even the revisionist cases; even the revisionist cases say the appellate courts cannot effectively reassess that. The result is way out of line, and highlights the need for this Court's attention to the rules that permitted it.

1. The Ninth Circuit's History Of Applying The Traditional Rules.

The weight of Ninth Circuit authority follows the traditional rules on the duties and limits of trial and appellate courts. Thus, most Ninth Circuit cases hold that, in deciding a new trial motion, the district court need not view the evidence from the perspective most favorable to the nonmoving party, but may weigh the evidence and assess the credibility of the witnesses. *Air-Sea Forwarders, Inc. v. Air Asia, Co.*, 880 F. 2d 176, 190 (9th Cir. 1989) (*citing Landes Construction Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987), and *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1302 (9th Cir. 1978)). Indeed, it is the "right" and "duty" of the trial court to weigh the facts. *Murphy v. Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990); *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir. 1957). The district court may order a new trial when it finds the jury's verdict against the "great weight" of the evidence, even where "substantial evidence" supports the jury's verdict. *Landes*,

833 F.2d at 1371-72; *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

As to appellate review, the Ninth Circuit generally applies the traditional rule that the court of appeals may not reweigh the evidence or reassess the credibility of the witnesses. *See Landes*, 833 F.2d at 1372 (*citing Palmer Coking Coal Co. v. Director, Office of Worker's Compensation Programs*, 720 F.2d 1054, 1058 (9th Cir. 1983)). The Ninth Circuit expressly has held that it may only determine whether the trial court's finding that the verdict is against the great weight of the evidence is a clear abuse of discretion, or, put differently, a "clear error." *Air-Sea*, 880 F.2d at 190 (*citing Cooling Systems and Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 487 (9th Cir. 1985)); *Phoenix v. COM/Systems, Inc.*, 706 F.2d 1033, 1036 (9th Cir. 1983).[11]

A different panel of the Ninth Circuit, without citing *Roy*, reaffirmed these traditional rules just six months ago, while the Petition for Rehearing in this case was pending. *Murphy v. Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990).

2. The Ninth Circuit's Departure From The Traditional Rules In This Case.

In this case, the court of appeals departed from the traditional rules, and instead applied revisionist

---

[11] Although some cases recite that the Ninth Circuit applies a "stringent standard" when the new trial motion is based on the weight of the evidence, that Court also has said that the "stringent standard" is really just the same as the "great weight" standard. *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985).

standards like those in the Third, Sixth, Eighth, Eleventh and D.C. Circuits.

a. The Weight Of The Evidence.

The trial judge found the Roys' evidence unreliable and the jury's verdict against "the great weight of the evidence." Under the traditional rule, that decision was unassailable. After all, the district court simply determined that two people could not see whether a vehicle was on or off the pavement from 2,000 feet, or seven football field lengths, away. The trial court based that determination on the testimony of three policemen who were there; a surveyor who was also there; videotapes which clearly demonstrated it; and all the physical evidence available. There was ample evidence to support the trial court's decision. Therefore, under traditional rules, the district court's determination was not clear error and should have been affirmed. Pp. 15-17, 19-21, 25-26, above.

The court of appeals, however, reversed. The court disregarded the trial court's judgment that the eyewitnesses – the Roys' *only* evidence on the critical liability question – were unreliable and disregarded its judgment that the overwhelming weight of the evidence on that critical causation issue was against the Roys.[12] Instead,

---

[12] Like many of the revisionist cases, the original opinion cited a JNOV case for the proposition that the trial court had no right to weigh evidence and credibility. *Roy II*, 896 F.2d at 1179 (*citing Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (*en banc*) (App. 19B). Volkswagen filed a Petition for Rehearing, pointing out the difference between JNOV standards and the Ninth Circuit's traditional new trial standards. In its order amending the decision and denying the petition, the Ninth Circuit deleted the JNOV case from the opinion, but did not change the reasoning or result that was based on it. *Roy v. Volkswagen of America, Inc.*, 920 F.2d 618, 618-619 (9th Cir. 1990) (App. 20C-21C).

like the revisionist courts, the court of appeals undertook to reweigh the evidence itself. It acknowledged that the Roys "did not dispute" that their eyewitnesses could not see the road markings, but nonetheless concluded that the witnesses' statements as to the van's position on the road were believable, based on the court of appeals' own view of the evidence. *Roy II*, 896 F.2d at 1178 (App. 17B). Pp. 8-9, above. The court of appeals thus concluded that the Roys had presented "persuasive" evidence, that Volkswagen's evidence "did not preponderate," that the evidence was "substantially balanced," and held the district court's contrary judgment to be an abuse of discretion. *Roy II*, 896 F.2d at 1177, 1179 (App. 15B, 19B).

b. Jury Prejudice.

On the jury prejudice issue, the court of appeals went even farther than the revisionist courts go. For even the revisionist courts recognize that the "trial judge who is actually present at the trial, is best able to determine whether the jury has been 'contaminated,' " such as by "prejudicial conduct or pernicious behavior." *McWhorter v. Birmingham*, 906 F.2d 674, 677 (11th Cir. 1990). Thus, they "hesitate to overturn the grant of a new trial based on such grounds." *Id. See also Watts v. Great Atlantic and Pacific Tea Co.*, 842 F.2d 307, 311 (11th Cir. 1988) (less scrutiny given to new trial orders based on "pernicious occurrences" such as "introduction of possibly inflammatory evidence"); *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 646 (D.C. Cir. 1988) (where "confusing testimony and events created a potential for injustice," the court of appeals "will ordinarily . . . affirm[].").

Here, the court of appeals did not "hesitate" to substitute its views on sympathy for those of the trial court. The district court, who saw the child, the burns, and their

effect on the jury, judged that sympathy for the badly burned child "pervaded the case," "overwhelmed the jury," and "swayed" it. *Roy I*, 600 F. Supp. at 655 (App. 6A). The second jury's verdict confirmed that the district court's assessment was right. The court of appeals, which was in no position to second-guess that judgment, nonetheless found that there was "no evidence" that the jury did not "put aside its personal feelings." *Roy II*, 896 F.2d at 1179 (App. 18B). It judged (without ever hearing the case, seeing the evidence or observing the jury) that the record "[did] not necessarily indicate that the jury's decision was born of sympathy." *Roy II*, 896 F.2d at 1179 (App. 18B).

D. The Court Should Grant Review To Resolve The Conflict.

We submit that the revisionist new trial standards, developed in other circuits and applied in this case, are ill-advised. They violate this Court's teachings. Pp. 12-14, above. They turn rational standards of review upside down, making appellate courts strictly scrutinize questions of fact. They restrict the trial court's discretion "after all [the] rulings have been made and all the evidence has been evaluated," *Cone*, 330 U.S. at 216, to assess credibility, weigh evidence, and reconsider the propriety and effect of earlier discretionary rulings – such as the decisions here to deny a jury view and deny bifurcation – to avoid a "miscarriage of justice." They saddle courts of appeals with a virtually unreviewable evidence-weighing role ill-suited to any reviewing court. They obscure the difference between the standards for JNOV and new trial. And they send the wrong message to the bench and bar, chilling trial judges' exercise of their duty to remedy injustice and letting advocates get away with prejudicial

trial practices that become whitewashed by the printed record. In short, the revisionist rules make no common sense.

But whatever the merits of the revisionist standards applied here, they conflict with the standards followed in other circuits (and in other cases within the Ninth Circuit itself). The confusion alone is reason to grant review.

This Court should remedy serious conflict, on a matter that touches every case tried in the federal courts.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DAVID M. HEILBRON
LESLIE G. LANDAU
ANNE O. HANNA
Three Embarcadero Center
San Francisco, California
Telephone: (415) 393-2000

Attorneys for Petitioners

McCUTCHEN, DOYLE,
BROWN & ENERSEN
Of Counsel

HERZFELD & RUBIN, P.C.
HERBERT RUBIN
MICHAEL HOENIG
IAN CERESNEY
DANIEL GSOVSKI
Of Counsel

March 15, 1991

Doug ROY, Jr., etc., et al., Plaintiffs,

v.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, A German Corporation, and Volkswagen of America, Inc., Defendants.

No. CV 83-5254-JWC.

United States District Court,
C.D. California.

Jan. 4, 1985.

David M. Harney, James J. Pagliuso, Los Angeles, Cal., for plaintiffs.

Robert E. King, Bakersfield, Cal., Michael A. Zuk, Los Angeles, Cal., for defendants.

MEMORANDUM OPINION

CURTIS, District Judge.

This court has before it defendants' motion to set aside the jury's verdict in the above entitled case, awarding plaintiffs, collectively, the sum of $3,000,000.00.

In this products liability case, the plaintiffs have sued the defendants for the defective design of a 1958 Volkswagen. The claim arises from an accident which occurred in February 1982, in which a 1958 Volkswagen van being driven by the plaintiff, Doug Roy, Jr., turned over and caught fire, seriously injuring Doug Roy, III, and to some extent his mother, father and sister.

According to the evidence, the Roy family was on a trip from their California home to home of relatives in Texas, a trip requiring several days travel. Along the way

some difficulty arose with respect to the fuel line. Whether it was because the line became clogged with dirt or for some other reason, insufficient fuel was reaching the engine to keep it running properly. In order to remedy this situation, Roy, Jr. removed the cap from the fuel fill pipe and inserted a rubber hose, surrounding it with rags and connecting the other end to the fuel pump, which apparently permitted the engine to perform satisfactorily.

While traveling on a two-lane highway at approximately 55 miles per hour, Roy made an abrupt turn to the left, causing the Volkswagen van to roll over, whereupon it caught fire causing the injuries alleged. This was indeed a tragic accident bringing an end to what had started out to be a happy family excursion. The record is replete with photographs of Roy, III, and the horribly disfiguring scars which his burns caused. It is one which indeed makes most difficult a dispassionate evaluation of the evidence upon a motion for a new trial, but after much careful consideration I can only conclude that the verdict is so contrary to common sense and the overwhelming weight of the evidence that I cannot in good conscience permit to remain.

The principal thrust of plaintiffs' case is their contention that the Volkswagen van was defectively designed, in that it had a tendency to roll over in circumstances such as those involved in this case. In the light of the voluminous technical testimony which was received in this case, it appears that the tendency of any vehicle to roll over is the result of the interaction of several factors; such as, the weight of the vehicle, the width of the tread, the center of gravity, the speed of the vehicle, the angle of

the turn, and the coefficient of friction between the tires and the pavement. The variation of any one of these factors materially affects the result. The experts further agreed that any vehicle will roll over given the right circumstances. From this, one must conclude that the mere fact that a vehicle rolls over during an accident does not necessarily mean that it is defective, nor does it mean that because one vehicle may have a greater tendency to turn over than another vehicle that the former is defective. The issue then before the jury was, did the fact that the Volkswagen van rolled over under the circumstances presented in this case indicate that the design of the van was defective.

A definition of a defective design was given to the jury in the court's instruction which read as follows:

> A product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended and reasonably foreseeable manner, or if there is a risk of danger inherent in the design which outweighs the benefits of that design.

The evidence is uncontested that this particular 1958 Volkswagen van performed no differently than that of any other Volkswagen van of the same vintage, or appreciably different from any other Volkswagen van manufactured thereafter.*

---

* Some claim was made that the swing axle which was later modified was a contributing factor, but the great weight of the evidence was to the contrary. Furthermore, it appears that the swing axle has been continued in use up until the present in some of the most expensive and well engineered cars on the market.

It is simply inconceivable that a vehicle of this type manufactured and sold by the millions over a period of twenty-five years, a vehicle which has met with phenomenol consumer acceptance can at this late date be found to have failed "to perform as safely as an ordinary consumer would expect."

The record is replete with video tape demonstrations which showed that the tendency of the Volkswagen van to roll is no greater than, if as great as, that of many American-made vans.

Admittedly, the center of gravity in a van is somewhat higher than that of a so-called "bug," but this was necessary in the design of the vehicle to accomplish the purposes for which it was manufactured, and the acceptance and use of such a vehicle throughout the world for twenty-five years demonstrates beyond a shadow of a doubt that its usefulness outweighs any slight risk of danger which it causes.

In my view, the verdict which finds the Volkswagen van defectively designed cannot be allowed to stand in the face of the overwhelming evidence to the contrary. Any risk of rolling over which may exist is inherent in the design and is necessary in order to enable the vehicle to perform its intended purpose. The design permits it to be handled as safely and in some instances more safely than other vehicles of similar design which have found universal acceptance in the marketplace even today. The Volkswagen design has remained virtually the same for approximately twenty-five years, during which time it has met with overwhelming consumer acceptance

throughout the entire world. To find such a design defective defies common sense.

Another critical issue in this case concerns the circumstances causing the vehicle to roll. Plaintiffs contend that while traveling approximately 55 miles an hour, the driver turned abruptly to the left in order to avoid a dog, and that the vehicle started and ended its roll on the smooth pavement. In fact, the main burden of plaintiffs' contention is that a vehicle which will roll in an abrupt turn on a smooth pavement under these circumstances would be defective. The defendants, on the other hand, contend that the driver apparently fell asleep and permitted the van to gradually drift off to the right on to the improved shoulder and ultimately beyond on to the unimproved portion of the highway, and then upon suddenly awakening he turned abruptly to the left in an attempt to get back on the highway. In the process the front wheels dug deeply into the dirt, which ruts together with the edge of the pavement to cause the vehicle to trip. Even plaintiffs' experts have admitted that the fact that a vehicle rolls after being tripped is no indication that the design of the vehicle is defective. It is therefore essential to plaintiffs' case that the evidence established that the roll commenced on the smooth pavement. On this issue the evidence overwhelmingly supports the defendants' theory. The pictures taken by the Chief of Police immediately after the accident clearly show the tracks made by the van, traveling precisely as defendants have contended. Although plaintiff speculated that these tracks could have been made by a passing vehicle attempting to avoid the burning van, such a theory is thoroughly inconsistent with the physical evidence. Plaintiff relies on the

testimony of two eyewitnesses to support his theory. These witnesses testified that while traveling in the opposite direction some 2,000 feet from the point of the accident, they saw the van turn over and burst into flame while it was traveling on the paved portion of the highway. The accuracy of such testimony is open to question because of the distance from which they observed the accident, and the improbability of them making an accurate observation of such a minor detail when suddenly confronted with a shockingly dramatic, tragic event such as that which appeared before them. Furthermore, video tapes demonstrate clearly that because of the nature of the terrain they would have been unable to judge from their point of observation whether the van commenced its roll on the pavement or off on the shoulder. And, there was no physical evidence of any kind such as marks on the highway to support plaintiffs' theory.

I think one must conclude from the great weight of evidence in this case that the design of the Volkswagen van was not defective and that, in any event, the roll over here under the circumstances hereinabove outlined was not the result of a defective design.

Although the jury should have been aware of these facts and circumstances, they were obviously swayed by emotion and sympathy for the little boy, Roy, III, which was generated by the many graphic and explicit photographs depicting his original burns and the many operations which he was required to endure as well as those yet to come. It is my belief that the emotion which prevaded [sic] this case, and which makes this court's decision a most difficult one, overwhelmed the jury, obscuring the issue of liability. In my view, for these

reasons to allow the verdict to stand would constitute a serious miscarriage of justice. The motion to set aside the verdict and for a new trial is hereby granted.

Doug ROY, Jr., Marsha Roy; Shannon Roy, a minor, By and Through her guardian Ad Litem, Doug Roy, Jr.; Doug Roy, III, a minor, by and through his guardian Ad Litem, Doug Roy, Jr., Plaintiffs-Appellents,

v.

VOLKSWAGEN OF AMERICA, INC.; Volkswagenwerk Aktiengesellschaft, a German Corporation, Defendants-Appellees.

No. 87-6340.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 30, 1989.

Decided Feb. 16, 1990.

Barry R. Levy, Horitz and Levy, Encino, Cal., David M. Harney, Harney and Packer, Los Angeles, Cal., for plaintiffs-appellants.

Michael A. Zuk, Herzfeld and Rubin, Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before HUG and CANBY, Circuit Judges, and David A. Ezra,* District Judge.

CANBY, Circuit Judge:

---

* Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

I. BACKGROUND

A. *Nature of the Case*

This is a products liability action arising from a single-vehicle car accident involving a 1958 Volkswagen van designed and distributed by appellees Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc. (collectively, "VW"). Appellants, the Roy family, were seriously injured when their 1958 VW van, driven by Doug Roy, Jr., rolled and caught fire. The Roys filed suit in the United States District Court against VW alleging a design defect in the van. The district court had jurisdiction under 28 U.S.C. § 1332.

A jury trial was held after the district court denied the Roys' motion to bifurcate the trial of liability and damages. The jury returned a unanimous verdict for the Roys in the amount of $3 million.[1] The jury assessed 60% of the fault to VW and 40% to Mr. Roy, finding that there was a defect in the design of the van and that the defect was a proximate cause of the injuries. The jury considered and refused an award of punitive damages.

Subsequently, the district court granted VW's motion to set aside the verdict and ordered a new trial. *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F.Supp. 653 (C.D.Cal.1985). The Roys appealed this order, but we dismissed the appeal because the order was interlocutory

---

[1] The award was allocated as follows: Doug Roy, Jr. received $50,000; his wife, Marsha Roy, $250,000; their daughter, Shannon Roy, $200,000; and their son, Doug Roy III, $2.5 million.

and, thus, not appealable. *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985).

On return to the district court,[2] the trial was bifurcated. The trial on liability resulted in a unanimous jury verdict for VW and judgment was entered accordingly. The Roys appeal the decisions in both trials, asserting that the jury verdict at the first trial was wrongly set aside and that the second trial was infected by various errors. Concluding that the district court erred in granting the new trial, we reverse and reinstate the original jury verdict for the Roys.

B. *Facts*

On August 14, 1982, the Roys embarked in their 1958 VW van on a family trip from their home in California to Texas. During the trip, the van experienced periodic mechanical problems related to the fuel line that caused the van to run roughly. Mr. Roy, who was experienced in repairing automobiles, replaced various parts hoping to remedy the problem. Though each repair initially seemed to make the van run well, the problem soon recurred.

At nightfall on August 16, 1982, the van again began to display symptoms of fuel deprivation and was losing speed. After examining the engine, Mr. Roy determined that the flow of fuel from the fuel line was restricted. Mr. Roy decided it best to make a temporary repair to the vehicle to allow the family to proceed to their destination where he could obtain the needed parts. He removed the

---

[2] The Honorable Jesse W. Curtis presided at the first trial; The Honorable Stephen V. Wilson at the second.

cap from the fuel fill pipe, plugged the opening in the fuel line and connected a make-shift fuel line by running a hose from the fuel pump into the fuel tank through the filler neck. Then, he wrapped a rag tightly around the hose in the filler neck to create a seal. After Mr. Roy's temporary repair, the van ran smoothly until the time of the accident.

What happened next is somewhat unclear. At approximately 8:00 a.m. on August 17, 1982, Mr. Roy was driving east on Interstate 10 just outside of Sonora, Texas. At that location, Interstate 10 is a level road with two lanes going in each direction. There is a paved shoulder which drops two to three inches to an unpaved coliche surface. Mr. Roy recalls driving in the slow lane at approximately 50-55 miles per hour. Suddenly, for reasons hotly disputed by the parties, the van overturned and began to roll. During the roll, the van caught fire. Each of the Roys, especially Doug Roy III, suffered significant injuries and trauma as a result of the accident.

II. JURISDICTION

The judgment of the district court in the second trial is a final judgment and is appealable to this court under 28 U.S.C. § 1291. The interlocutory order granting the second trial is now subject to review. *See Evers v. Equifax, Inc.*, 650 F.2d 793, 796 (5th Cir.1981).

III. ANALYSIS

A. *Standard of Review*

"The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if 'the

verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.' " *Hanson v. Shell Oil Company*, 541 F.2d 1352, 1359 (9th Cir.1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977) (citing *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir.1957). While the trial court may weigh the evidence and credibility of the witnesses, the court is not justified in granting a new trial "merely because it might have come to a different result from that reached by the jury." *Wilhelm v. Associated Container Transportation (Australia) Ltd.*, 648 F.2d 1197, 1198 (9th Cir.1981). We review an order granting or denying a motion for new trial for an abuse of discretion. *Air-Sea Forwarders, Inc. v. Air Asia Company Ltd.*, 880 F.2d 176, 190 (9th Cir.1989). Thus, if the jury's verdict is not clearly against the weight of the evidence, the trial court abuses its discretion in ordering a new trial. *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1420 (9th Cir.1989).

B. *The District Court's Grant of a New Trial*

In granting a new trial, the district court ruled that the jury's verdict finding a design defect in the 1958 VW van was against the great weight of the evidence. *See Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F.Supp. 653, 655 (C.D.Cal.1985). We disagree.

The district court correctly instructed the jury at the first trial that:

> A product is defective in design if it fails to perform as safely as an ordinary consumer would expect when used in an intended and

> reasonably foreseeable manner, or if there is a risk of danger inherent in the design which outweighs the benefits of that design.

Barker v. Lull Engineering Co., 20 Cal.3d 413, 429-30, 432, 143 Cal.Rptr. 225, 235-38, 573 P.2d 443, 453-56 (1978). After hearing the evidence, the jury determined that the *Barker* test had been satisfied with respect to the VW van. The trial judge rejected this finding, relying heavily on the long use and popularity of the VW van. Though relevant, consumer acceptance alone does not insulate VW from a finding that its van is defectively designed. *See Culpepper v. Volkswagen of America, Inc.*, 33 Cal.App.3d 510, 518, 109 Cal.Rptr. 110, 115 (1973) (suspension system of the VW "bug", which enjoyed wide consumer acceptance, found defectively designed where car had propensity to roll over). Long use and popularity of the VW van therefore do not alone justify the granting of the new trial. We turn, then, to the evidence presented at the first trial concerning the design of the VW van and the circumstances surrounding the accident.

1. Evidence of Design Defect

The expert evidence presented at the first trial concerning the design of the VW van was extensive and contradictory. The Roys contended that the swing-axle suspension system employed in the 1958 VW van was unstable and defective. William P. Thomas, who directed the race car programs for the Chevrolet Division of General Motors from 1956 to 1970, testified that when the van is turned, the VW suspension caused the back of the van to rise up and the wheels to drop. This reaction is known as "jacking." The jacking exacerbated the high center of

gravity and narrow wheel base that makes a van inherently more unstable than other vehicles. Dr. Igor Paul, a tenured associate professor of mechanical engineering at the Massachusetts Institute of Technology, also testified that the van would jack when turned. Dr. Paul suggested that jacking made the van susceptible to rolling over under circumstances that would not have caused similar American vans to roll.

The Roy's also presented to the jury the results of a "bunji cord" test developed by Paul O'Shea to monitor the reaction of vehicles when turned sharply.[3] Mr. O'Shea's test showed that the VW van would roll when turned sharply at between 18.2 and 18.4 miles per hour,

---

[3] In the Bunji Cord test, a cable is attached to the car and it is wrapped around a hub device affixed to the steering wheel; the cable then runs to a pulley on the passenger's side, then back into a box containing the bunji cords. A pin is then inserted to hold the bunji cords taut; a lanyard is attached to the car from a tow truck. The truck then pulls the driverless car, with its engine off and its gear in neutral, to a certain speed at which point the lanyard is released; the disengaging of the lanyard causes the pin holding the bunji cords to be released also. When the pin is released, the bunji cords retract, thereby turning the steering wheel far enough to impart certain fixed degrees of turn to the front wheels. *See Culpepper v. Volkswagen of America, Inc.*, 33 Cal.App.3d at 515 n. 4, 109 Cal.Rptr. at 113 n. 4. Mr. O'Shea used this procedure to test the stability of the VW "bug". The results of those tests were admitted in *Culpepper*, where the court concluded that the jury could properly have found that a vehicle is defective if it rolls over on a flat, smooth surface when it is travelling 50-55 miles per hour and turned 18 degrees. *Id.* at 518, 109 Cal.Rptr. at 115. Mr. O'Shea testified at trial in this case that his tests demonstrate that it is easier to roll a VW van than it is to roll the VW bug.

whereas a 1967 Chevrolet van would not roll under the same conditions.

Dr. Paul and Mr. O'Shea further testified that the 1958 VW van had a tendency to change abruptly from "understeer" to "oversteer." During an evasive maneuver, this tendency could cause the van to turn more sharply than the driver intended or expected, compounding the instability of the van.

VW's experts challenged the credibility and conclusions of the Roys' experts. Some testified that jacking and the change from understeer to oversteer did not make the van less stable. In fact, Edward Heitzman, an automotive test engineer, testified that several top sports cars are designed to change from understeer to oversteer at high G's and that this characteristic was helpful in an emergency. VW also showed the jury a videotape of tests it performed on its own van and comparable American vans. These tests indicated that the VW van was no less stable than other vans on the market. In short, each side presented persuasive evidence in support of its position.

2. Was the Design Defect a Proximate Cause of the Accident?

Not only was the existence of a design defect at issue in this trial; the parties also disputed whether the alleged defect caused the accident. Again, the evidence was contradictory. Appellants contended that the driver, Mr. Roy, was traveling at approximately 55 miles per hour when he turned sharply to the left to avoid a dog, causing the van to roll. They claimed that the van never left the pavement and that any vehicle that would roll on a

smooth pavement under those circumstances did so as the result of a design defect. Mr. Roy and two eye witnesses, Wade Fitzgerald and Jerry Jardee, all testified that the van never left the pavement.

VW painted a different picture. It contended that Mr. Roy fell asleep while driving and drifted onto the unimproved portion of the highway. When he awoke, he turned abruptly to the left to return to the road. The combination of the ruts created by the wheels digging into the dirt and the edge of the pavement tripped[4] the van. Both parties agree that the fact that a vehicle rolls after being tripped is not indicative of a design defect.

VW introduced evidence to impugn the testimony of the Roys' witnesses concerning where the roll began. They cited testimony by Mr. Roy indicating that he did not know whether the vehicle ever left the paved surface. Further, Carr Thomson, a professional surveyor and licensed civil engineer in the State of Texas, testified that, from their distant position in an oncoming lane, Mr. Fitzgerald and Mr. Jardee could not have observed whether the van left the paved surface of the highway. He suggested that the elevation of the highway and the crown of the surface of the roadway made it impossible to observe the surface of the highway, the lane markings on the highway, the adjoining paved shoulder, or the

---

[4] "Tripping" occurs when a moving vehicle hits an obstruction at some steering angle. The obstruction may consist of such barriers as a rut in the dirt, a mound of gravel thrown up by the action of the wheels while sliding sideways, or the abrupt elevation of the asphalt pavement over the adjoining ground surface of the road shoulder.

adjoining gravel shoulder. The Roys did not dispute that the highway markings were not visible from the vantage point of the eye witnesses, but contended nevertheless that Mr. Fitzgerald and Mr. Jardee could have determined in which lane the van was traveling.

VW also presented the testimony of Dr. John Habberstad who purported to reconstruct what happened during the accident. In developing his accident reconstruction, Dr. Habberstad relied on the notes of John Ferguson, a Texas trooper who investigated the accident, and on photographs taken by Raymond Gesch, the Chief of Police for Sonora, Texas. Dr. Habberstad's reconstruction supported VW's theory of the accident.

The Roy's, in turn, challenged the validity of Dr. Habberstad's reconstruction. They cited Dr. Habberstad's testimony that he considered only that evidence supporting his theory and ignored that which did not. They further noted that Trooper Ferguson's testimony at trial was substantially different from his deposition testimony where he stated, "I believe [the van] began to overturn on the white shoulder stripe which divides the improved shoulder with the main traveled portion of the roadway." He did not change his opinion to conclude that the van rolled while on the unimproved shoulder until after conferring with Dr. Habberstad.

In addition, the parties disputed the cause of the fire. VW's experts testified that the van's fuel system was well-designed, that Mr. Roy's repairs caused the fire, and that there would have been no fire had the gas cap been in place. The Roy's experts concluded that the van's tap valve was susceptible to clogging, that Mr. Roy's actions

were a good temporary repair, and that the fire would have occurred even with the gas cap in place. Again, both sides presented significant evidence to support their theories.

3. The Role of Sympathy in the Jury Verdict

The district court also based its granting of a new trial on its perception that the jurors were swayed by emotion and sympathy for Doug Roy III. It pointed to no evidence, however, to support this ruling. Certainly a jury presented with a case like this one, involving horrible burn injuries to a child, will be likely to feel great sympathy. The question, however, is whether the jury was able to put aside its personal feelings during its deliberations and decide the case as the evidence and the law dictated. There is no evidence that the jury here did otherwise. The district court repeatedly instructed the jury that sympathy could play no role in their deliberations. Moreover, the damages awarded were consistent with the amount the experts estimated would be required to compensate the Roys for their injuries and treatment. Punitive damages were denied. In light of the conflicting evidence, the verdict for the Roys does not necessarily indicate that the jury's decision was born of sympathy.

VW presented weighty evidence to the jury to counter the Roys' claims that a defect in the design of the VW van was the primary cause of the Roys' injuries. Nevertheless, the Roys' also strongly supported their claims. "[I]t is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence

and inferences, and determine the credibility of witnesses." *Boeing Company v. Shipman*, 411 F.2d 365, 375 (5th Cir.1969) (en banc). Although under the evidence the jury could have concluded that the van was not defective, or that the defect was not a proximate cause of the accident, this possibility does not warrant granting a new trial. The evidence in this case was substantially balanced. VW's evidence did not so preponderate that it fell within the discretion of the trial judge to rule that the jury's verdict was against the great weight of the evidence.

Conclusion

The District Court abused its discretion in setting aside the jury verdict in the first trial and ordering a new trial. We therefore reinstate the jury verdict in the first trial in favor of the Roys. In light of our ruling, it will not be necessary to address any of the errors alleged to have occurred in the second trial.

REVERSED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG ROY, JR., MARSHA ROY; SHANNON ROY, a minor, by and through her guardian Ad Litem, DOUG ROY, JR.; DOUG ROY, III, a minor, by and through his guardian Ad Litem, DOUG ROY, JR., *Plaintiffs-Appellants,* v. VOLKSWAGEN OF AMERICA, INC.; VOLKSWAGENWERK AKTIENGESELLSCHAFT, a German Corporation, *Defendants-Appellees.*	No. 87-6340 D.C. No. CV-83-5254-SVW ORDER AMENDING OPINION

Filed December 17, 1990

Before: Procter Hug, Jr. and William C. Canby, Jr., Circuit Judges and David A. Ezra,* District Judge.

ORDER

The opinion previously filed in this case and reported at 896 F.2d 1174, is amended as follows:

* The Honorable David A. Ezra, United States District Judge for the District of Hawaii, sitting by designation.

At 896 F.2d at 1175, right column, line 5:

Delete "the Roys' motion" and substitute "VW's motion."

At 896 F.2d at 1179, left column, lines 22-28:

Delete quotation from, and citation of *Boeing Company v. Shipman*. Substitute the following,

"The district court's authority to order a new trial is admittedly less constrained than its authority to enter a judgment contrary to the jury's verdict. However, the district court may order a new trial only if it finds that the jury's verdict was 'clearly contrary to the weight of the evidence.' *McGhee v. Arabian American Oil Co.*, 871 F.2d 1412, 1420 (9th Cir. 1989) (quoting *William Inglis & Sons v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981))."

At 896 F.2d at 1179, left column, line 38:

At the end of the paragraph, add:

"*See id.*[5]".

Then add a new Footnote 5 as follows:

[5]VW contends that this case is controlled by *Air-Sea Forwarders, Inc. v. Air Asia, Ltd.*, 880 F.2d 176 (9th Cir. 1989). However, our case is not a case where the district judge's grant of a new trial was based upon the lack of credibility of the plaintiffs' crucial witnesses. In *Air-Sea Forwarders*, we noted that the plaintiffs' evidence on the issue in question was based almost exclusively on two witnesses. The district court found these two witnesses to be incredible because of their prior inconsistent statements. In the

action before us, it is true that the plaintiffs' case was based in part upon the testimony of two eyewitnesses, and that the trial judge stated that the "accuracy" of their testimony was "open to question," not because of prior inconsistent statements or demeanors suggesting untruthfulness, but because of the distance from which they observed the accident. We construe the trial judge's comment as going to the weight of the eyewitnesses' testimony, rather than to their truthfulness as witnesses. Moreover, there was considerable other evidence supporting the plaintiffs' contentions. The judge did not grant the new trial on grounds of credibility, as in *Air-Sea Forwarders*, but rather on what he perceived to be the great weight of the evidence in general. The district judge stated:

> I think one must conclude from the great weight of the evidence in this case that the design of the Volkswagen van was not defective and that, in any event, the roll over here under the circumstances herein-above outlined was not the result of a defective design.

Roy v. Volkswagenwerk Aktiengesellschaft, 600 F. Supp.at 655.

With that amendment, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and of the above amendment and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(2)

No. 90-1464

Supreme Court, U.S.
FILED
APR 18 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

VOLKSWAGEN OF AMERICA, INC. AND VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Petitioners,

vs.

DOUG ROY, JR., Individually; MARSHA ROY, Individually; SHANNON ROY, a minor, By and through Her Guardians Ad Litem, DOUG ROY, JR. and MARSHA ROY; and DOUG ROY, III, a Minor, By and through His Guardians Ad Litem, DOUG ROY, JR. and MARSHA ROY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

LAW OFFICES OF DAVID M. HARNEY
HORVITZ & LEVY
BARRY R. LEVY*
MITCHELL C. TILNER
15760 Ventura Boulevard, 18th Floor
Encino, California 91436
(818) 995-0800 and (213) 872-0802

Attorneys for Respondents

*Counsel of Record

April 18, 1991

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Ninth Circuit correctly apply the settled standard of review (abuse of discretion) in reversing the order of the United States District Court for the Central District of California granting a new trial on the ground the jury's verdict was against the great weight of the evidence?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 2

STATEMENT OF THE CASE 3

I. THE PERTINENT FACTS 3

II. PROCEDURAL HISTORY 6

A. The District Court's New Trial Order 6

B. The Court Of Appeals' Decision 7

C. Volkswagen's Pending Appeal 11

D. Volkswagen's Petition For Certiorari 11

LEGAL DISCUSSION 11

THE COURT OF APPEALS CORRECTLY APPLIED THE UNIVERSALLY RECOGNIZED ABUSE OF DISCRETION STANDARD IN REVERSING THE DISTRICT COURT'S NEW TRIAL ORDER 11

CONCLUSION 22

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Abasiekong v. City of Shelby,
744 F.2d 1055 (4th Cir. 1984) 13, 20

Air-Sea Forwarders, Inc. v. Air Asia Co.,
880 F.2d 176 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 868 (1990) 14

Allied Chem. Corp. v. Daiflon, Inc.,
449 U.S. 33 (1980) 16

Berner v. British Commonwealth Pac. Airlines, Ltd.,
346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) 13, 20

Coffran v. Hitchcock Clinic, Inc.,
683 F.2d 5 (1st Cir.), *cert. denied*, 459 U.S. 1087 (1982) 13, 20

Consumers Power Co. v. Curtiss-Wright Corp.,
780 F.2d 1093 (3d Cir. 1986) 13

Continental Air Lines, Inc. v. Wagner-Morehouse, Inc.,
401 F.2d 23 (7th Cir. 1968) 20

Conway v. Chemical Leaman Tank Lines, Inc.,
610 F.2d 360 (5th Cir. 1980) 19, 20

Crane v. Consolidated Rail Corp.,
731 F.2d 1042 (2d Cir.), *cert denied*, 469 U.S. 854 (1984) 18

Digidyne Corp. v. Data Gen. Corp.,
734 F.2d 1336 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985) 20

Duncan v. Duncan,
377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967) 15, 20

TABLE OF AUTHORITIES – Continued

Page

Fairmount Glass Works v. Cub Fork Coal Co.,
287 U.S. 474 (1933) 13

Fireman's Fund Ins. Co. v. Aalco Wrecking Co.,
466 F.2d 179 (8th Cir. 1972), *cert. denied*, 410 U.S.
930 (1973) 19

Goldsmith v. Diamond Shamrock Corp.,
767 F.2d 411 (8th Cir. 1985) 13

J & H Auto Trim Co. v. Bellefonte Ins. Co.,
677 F.2d 1365 (11th Cir. 1982) 19

Landes Constr. Co. v. Royal Bank of Canada,
833 F.2d 1365 (9th Cir. 1987) 19

Lind v. Schenley Indus., Inc.,
278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 385
(1960) 20

McGee v. South Pemiscot School Dist. R-V,
712 F.2d 339 (8th Cir. 1983) 15, 20

McNeal v. Hi-Lo Powered Scaffolding, Inc.,
836 F.2d 637 (D.C. Cir. 1988) 12, 20

Moore v. Shultz,
491 F.2d 294 (10th Cir.), *cert. denied*, 419 U.S. 930
(1974) 21

O'Neil v. W.R. Grace & Co.,
410 F.2d 908 (5th Cir. 1969) 16

Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.,
846 F.2d 1247 (10th Cir. 1988) 14

Payton v. Abbott Labs,
780 F.2d 147 (1st Cir. 1985) 17

Portage II v. Bryant Petroleum Corp.,
899 F.2d 1514 (6th Cir. 1990) 13

TABLE OF AUTHORITIES – Continued

Page

Rabun v. Kimberly-Clark Corp.,
678 F.2d 1053 (11th Cir. 1982) 14

Rios v. Empresas Lineas Maritimas Argentinas,
575 F.2d 986 (1st Cir. 1978) 15

Rosenfield v. Wellington Leisure Prods, Inc.,
827 F.2d 1493 (11th Cir. 1987) 19, 20

Roy v. Volkswagen of Am., Inc.,
896 F.2d 1174 (9th Cir. 1990) ..... *passim*

Roy v. Volkswagen of Am., Inc.,
920 F.2d 618 (9th Cir. 1990) 11, 21

Roy v. Volkswagenwerk Aktiengesellschaft,
600 F. Supp. 653 (C.D. Cal. 1985) ..... *passim*

Roy v. Volkswagenwerk Aktiengesellschaft,
781 F.2d 670 (9th Cir. 1985) 7

Shows v. Jamison Bedding, Inc.,
671 F.2d 927 (5th Cir. 1982) 13

Spanish Action Comm. of Chicago v. City of Chicago,
766 F.2d 315 (7th Cir. 1985) 13

Taylor v. Washington Terminal Co.,
409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835
(1969) 19

Tennant v. Peoria and Pekin Union Ry.,
321 U.S. 29 (1944) 20

Watts v. Great Atl. and Pac. Tea Co.,
842 F.2d 307 (11th Cir. 1988) 21

Wilhelm v. Associated Container Transp. (Australia) Ltd.,
648 F.2d 1197 (9th Cir. 1981) 17

Williams v. City of Valdosta,
689 F.2d 964 (11th Cir. 1982) 15, 16, 18, 19

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Federal Rule of Civil Procedure 50(c) 14

Federal Rule of Civil Procedure 59.....6, 14

COURT RULES

Sup. Ct. R. 10 22

TEXTS

6A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶ 59.08 (2d ed. 1989)..... 12, 13, 17

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th ed. 1986)..... 22

9 C. Wright & A. Miller, Federal Practice and Procedure § 2540 (1971) 14

11 C. Wright & A. Miller, Federal Practice and Procedure § 2806 (1973) 21

11 C. Wright & A. Miller, Federal Practice and Procedure § 2819 (1973) 12, 18

MISCELLANEOUS

J. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. B.A. 541 (1958)..... 22

Recent Decisions, *Appellate Review in the Federal Courts of Orders Granting New Trial*, 13 Stan. L. Rev. 383 (1961) 12, 13

No. 90-1464

In The

Supreme Court of the United States

October Term, 1990

VOLKSWAGEN OF AMERICA, INC. AND VOLKSWAGENWERK AKTIENGESELLSCHAFT,

Petitioners,

vs.

DOUG ROY, JR., Individually; MARSHA ROY, Individually; SHANNON ROY, a minor, By and through Her Guardians Ad Litem, DOUG ROY, JR. and MARSHA ROY; and DOUG ROY, III, a Minor, By and through His Guardians Ad Litem, DOUG ROY, JR. and MARSHA ROY,*

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

* In their caption, petitioners mistakenly identified Marsha Roy as a minor and omitted Shannon Roy, a minor. Respondents are correctly identified in the caption to this brief in opposition.

INTRODUCTION

This is a products liability action based on defects in a passenger van designed and distributed by petitioners Volkswagenwerk Aktiengesellschaft and Volkswagen of America, Inc. (collectively "Volkswagen"). Doug Roy ("Mr. Roy"), his wife Marsha, and their children Shannon and Doug, III, were seriously injured when their Volkswagen van rolled over and caught fire. They brought a diversity action against Volkswagen based on theories of strict liability, negligence, and breach of warranty. The Roys alleged that the defective design of the Volkswagen van made it highly unstable and caused it to roll over.

At trial, the issues of design defect and causation were hotly contested. A unanimous jury found in favor of the Roys. The district court, however, granted Volkswagen's motion for a new trial, believing the verdict was contrary to the great weight of the evidence.

The second trial resulted in a verdict for Volkswagen. The Roys appealed, asserting that the jury's verdict in the first trial was wrongly set aside and that the second trial was infected by various errors. The Ninth Circuit reversed, holding the district court had abused its discretion in setting aside the first jury verdict. The court of appeals ordered reinstatement of the original jury verdict in favor of the Roys. Volkswagen sought rehearing and rehearing en banc. Both were denied. Not a single circuit court judge requested a vote to hear the matter en banc.

Now, Volkswagen seeks a writ of certiorari on the ground there is a conflict among the circuits concerning the standard of review for new trial orders. Volkswagen labors long and hard to create this supposed conflict. In

fact, none exists. All circuits agree that a district court's decision to order a new trial on the ground a verdict is contrary to the great weight of the evidence may be reversed for an abuse of discretion. This is precisely the standard the Ninth Circuit applied in this case.

What Volkswagen is really complaining about is not that the Ninth Circuit applied the wrong standard of review, but that it concluded the district court had abused its discretion in granting a new trial in this particular case.

Under these circumstances, review is unwarranted. The petition should be denied.

STATEMENT OF THE CASE

I. THE PERTINENT FACTS.

On the morning of August 14, 1982, the Roys set out in their VW van on a family trip from their home in California to Texas. "During the trip, the van experienced periodic mechanical problems related to the fuel line that caused the van to run roughly. Mr. Roy, who was experienced in repairing automobiles, replaced various parts hoping to remedy the problem. Though each repair initially seemed to make the van run well, the problem soon recurred." *Roy v. Volkswagen of Am., Inc.*, 896 F.2d 1174, 1175-76 (9th Cir. 1990).

At nightfall on August 16, 1982, somewhere past El Paso, the van again began to display symptoms of fuel deprivation and to lose speed. *Id.* at 1176. The Roys

pulled off the highway. It was drizzly and dark. Reporter's Transcript (hereinafter "R.T.") at 370. With no service station in the area, Mr. Roy was forced to improvise a repair to keep the van going. R.T. at 534. He plugged the opening of the fuel line and connected an alternative line from the fuel pump into the fuel tank. R.T. at 514-16. Mr. Roy considered the fuel bypass hose a temporary repair which he would replace the next day when he arrived at his destination. R.T. at 517-18.

After the repair, the van ran smoothly until the time of the accident. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176. Mr. Roy continued to drive for an hour and then turned the wheel over to Marsha while he slept in the back. R.T. at 370, 374, 483-84. The next morning, Mr. Roy awoke refreshed and started to drive. At approximately 8:00 a.m., Mr. Roy was driving east on Interstate 10 just outside of Sonora, Texas. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176. At that point, Interstate 10 is a flat, level road with two lanes going in each direction, a paved shoulder, an unpaved coliche surface outside the paved shoulder, and a grass and dirt median. *Id.* at 1176; R.T. at 57, 111. There is a two-to-three-inch drop-off leading to the unimproved surface. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176. Mr. Roy recalls driving in the slow lane at approximately 50-55 miles per hour. *Id.* Suddenly, for reasons hotly disputed by the parties, the van overturned, began to roll, and caught fire. *Id.*

"Mr. Roy and two eye witnesses, Wade Fitzgerald and Jerry Jardee, all testified that the van never left the pavement." *Id.* at 1178. The two eyewitnesses were driving onto Interstate 10 from the east, opposite the Roys, R.T. at 54-57, when they observed the accident. R.T. at

61-65, 133, 145, 149, 159, 161-62. Both witnesses testified they saw the van roll over and burst into flames while it was on the paved portion of the highway. R.T. at 61-65, 77, 128-29, 145, 149, 161; exhibits 3, 11. Jardee testified he saw a dog on the road as the accident was unfolding and presumed Mr. Roy swerved to avoid hitting it. R.T. at 147-48, 159, 165, 236. Volkswagen, which offered no eye-witness testimony, speculated that Mr. Roy fell asleep while driving and drifted onto the unimproved portion of the highway. When he awoke and realized where he was, Volkswagen contended, he turned abruptly in an attempt to return to the road, causing the van to "trip" when the wheels hit the two-to-three-inch elevated pavement.

Mrs. Roy was thrown from the van as it rolled. R.T. at 65, 74. She ran to the back of the van to remove Doug Roy, III, who was on fire. R.T. at 65, 75, 163. Fitzgerald and Jardee helped rescue Shannon and Mr. Roy from the burning van. R.T. at 75, 138-40. Mr. Roy passed out when the fire hit him. R.T. at 487. Each of the Roys suffered significant injuries and trauma as a result of the accident. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176. Doug Roy, III, who was burned most severely, will require lifelong medical attention, including extensive skin grafting. R.T. at 137, 163, 318-32, 471, 698-99, 709-25.

The expert evidence presented at trial concerning the defective design of the Volkswagen van was extensive and contradictory. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1177. Among other things, the Roys' experts testified that the swing-axle suspension system was unstable and defective, making the van susceptible to rolling over. *Id.*

II. PROCEDURAL HISTORY.

A. The District Court's New Trial Order.

In November 1984, a unanimous jury returned a special verdict finding that the van was defectively designed and the defect caused the Roys' injuries. The jury awarded $3,000,000 in compensatory damages to the Roys. The jury assessed 40% of the fault to the driver, Mr. Roy. However, the district court, Judge Jesse Curtis, granted Volkswagen's motion for a new trial under Federal Rule of Civil Procedure 59, on the ground the verdict was against the great weight of the evidence. *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F. Supp. 653 (C.D. Cal. 1985).

First, the court believed the jury's finding that the Volkswagen van was defectively designed was contrary to the great weight of the evidence.[1] Second, it believed that the jury's determination that the roll over was caused by the van's defective design was against the great weight of the evidence. *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F. Supp. at 654-55.[2] The district court explained that it was essential for the Roys to prove that the roll over commenced while the vehicle was on the paved portion of the road. *Id.* at 655. The district court

---

[1] The Ninth Circuit rejected the district court's determination on this point. Volkswagen does not challenge the Ninth Circuit's ruling in this regard. Petn. at 6 n.4.

[2] Since the district court disagreed with the jury's defect and causation findings, the court concluded the jurors must have been "swayed by emotion and sympathy for the little boy." *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F. Supp. at 655.

refused to credit the testimony of the two independent eyewitnesses and relied solely on the evidence presented by Volkswagen. Specifically, the district court found that the testimony of the eyewitnesses was not supported by police photographs taken following the accident, that "there was no physical evidence of any kind such as marks on the highway to support plaintiffs' theory," and that video tapes prepared by Volkswagen demonstrated that the eyewitnesses could not have determined from their vantage point whether the van commenced its roll on the pavement or off the road. *Roy v. Volkswagenwerk Aktiengesellschaft*, 600 F. Supp. at 655.

The Roys attempted to appeal Judge Curtis' new trial order, but the Ninth Circuit held that the order, being interlocutory in nature, was not appealable. *Roy v. Volkswagenwerk Aktiengesellschaft*, 781 F.2d 670 (9th Cir. 1985).

Pursuant to the new trial order, a second trial took place, resulting in a defense verdict.[3] After judgment was entered in favor of Volkswagen, the Roys appealed, arguing that Judge Curtis abused his discretion in granting Volkswagen's motion for a new trial and that the second trial was infected by various errors.

B. The Court Of Appeals' Decision.

The court of appeals set forth the standard it would apply to review the district court's new trial order as follows:

---

[3] Judge Stephen V. Wilson presided over the second trial.

> "The trial court may grant a new trial, even though the verdict is supported by substantial evidence, if 'the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.' " While the trial court may weigh the evidence and credibility of the witnesses, the court is not justified in granting a new trial "merely because it might have come to a different result from that reached by the jury." We review an order granting or denying a motion for new trial for an abuse of discretion. Thus, if the jury's verdict is not clearly against the weight of the evidence, the trial court abuses its discretion in ordering a new trial.

Roy v. Volkswagen of Am., Inc., 896 F.2d at 1176 (citations omitted).

Applying this standard, the circuit court unanimously agreed with the Roys that the district court had abused its discretion in granting Volkswagen's motion for a new trial.[4] The court of appeals first held that the jury's finding of a design defect was not contrary to the great weight of the evidence. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176-77. Volkswagen does not challenge this holding. Petn. at 6 n.4.

The court of appeals then turned to the causation issue, the alternative ground cited by the district court to justify its new trial order. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1177-78. The court focused on the evidence

---

[4] In light of this ruling, the court found it unnecessary to address any of the claims concerning the second trial. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1179.

offered by Volkswagen, upon which the district court had so heavily relied. A surveyor retained by Volkswagen testified that from their vantage point, the two eyewitnesses could not have observed the surface of the highway, the lane markings on the highway, or the adjoining gravel shoulder. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1178. However, as the court of appeals noted: "The Roys did not dispute that the highway markings were not visible from the vantage point of the eye witnesses, but contended nevertheless that Mr. Fitzgerald and Mr. Jardee could have determined in which lane the van was traveling." *Id.*

The court also referred to the testimony of Volkswagen's accident reconstructionist who speculated that Mr. Roy had fallen asleep at the wheel, drifted off the road, and caused the van to roll over when he attempted to return to the highway. R.T. at 1468-69. The reconstructionist relied on notes and photographs taken by police at the scene following the accident. *Id.* The court noted the reconstructionist testified that he ignored evidence which did not support his (i.e., Volkswagen's) theory. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1178. The court also noted that the trial testimony of the Texas trooper who took the notes upon which the accident reconstructionist relied differed substantially from his deposition testimony, which had been consistent with the eyewitnesses' version of events. Furthermore, the trooper changed his position only after he had conferred with Volkswagen's reconstructionist. *Id.*

The Ninth Circuit concluded: "The evidence in this case was *substantially balanced*. VW's evidence did not so preponderate that it fell within the discretion of the trial

judge to rule that the jury's verdict was against the great weight of the evidence." *Id.* at 1179 (emphasis added).[5] The Ninth Circuit ordered reinstatement of the original jury verdict.

Volkswagen petitioned the Ninth Circuit for rehearing and suggested a rehearing en banc. After amending the opinion in minor respects, the three-judge panel

---

[5] The Ninth Circuit also addressed the district court's conclusion that the jury must have been "swayed by emotion and sympathy." *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1178-79. The court of appeals realized this reference to emotion and sympathy was merely a conclusory statement, noting that the district court "pointed to no evidence . . . to support [its] ruling [that the jury was improperly swayed by emotion and sympathy]." *Id.* at 1178.

The issue is not whether there may have been jury sympathy, but whether the verdict was against the great weight of the evidence. As the court of appeals pointed out:

> Certainly a jury presented with a case like this one, involving horrible burn injuries to a child, will be likely to feel great sympathy. The question, however, is whether the jury was able to put aside its personal feelings during its deliberations and decide the case as the evidence and the law dictated. *There is no evidence that the jury here did otherwise.*

Id. at 1178-79 (emphasis added).

In fact, the jury's verdict demonstrates it did put aside any feelings of sympathy and considered the case on its merits. The damages awarded were consistent with the amount the experts estimated would be required to compensate the Roys for their injuries and treatment. Moreover, the jury declined to award punitive damages. *Id.* at 1179. Finally, the jury assessed 40% of the fault to Mr. Roy. These are hardly the findings of a jury overcome by sympathy.

unanimously denied the petition. *Roy v. Volkswagen of Am., Inc.*, 920 F.2d 618 (1990). The full court was advised of Volkswagen's en banc suggestion, but *not a single judge requested a vote to decide whether to rehear the matter en banc. Id.* at 619.

C. Volkswagen's Pending Appeal.

By order entered January 28, 1991, the district court filed and spread the mandate of the Ninth Circuit. On February 15, 1991, Volkswagen filed a notice of appeal with the Ninth Circuit seeking to overturn the original jury verdict. Respondents' Appendix at 1a. The appeal is pending.

D. Volkswagen's Petition For Certiorari.

On March 18, 1991, the same day it filed its Civil Appeals Docketing Statement with the Ninth Circuit in the pending appeal, Volkswagen filed its petition for certiorari with this Court.

LEGAL DISCUSSION

THE COURT OF APPEALS CORRECTLY APPLIED THE UNIVERSALLY RECOGNIZED ABUSE OF DISCRETION STANDARD IN REVERSING THE DISTRICT COURT'S NEW TRIAL ORDER.

Volkswagen argues that there is "a conflict among the circuits about the scope of the district courts' discretion to order a new trial, and the appellate courts' power of

review." Petn. at 12.[6] Volkswagen classifies the appellate courts into so-called "traditionalists" and "revisionists," concludes the latter are gaining the upper hand, and thereby attempts to create the impression that there is a crisis within the federal judiciary which requires "[t]his Court's guidance . . . to secure a uniform rule on an issue that touches every case tried in the United States district courts." Petn. at 11.[7]

The reality is quite different. Although at one time orders granting or denying a new trial on the ground a verdict was against the great weight of the evidence were considered nonreviewable, *see generally* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2819, at 120-21 (1973), today *all* courts agree such orders are reviewable for an abuse of discretion.[8] *See, e.g., McNeal v. Hi-Lo*

---

[6] Volkswagen has framed its argument in the form of two distinct issues, focusing separately on the trial courts' discretion in ruling on new trial motions and on appellate review of such rulings. Because the two are inseparably linked, we address them together in this brief.

[7] Volkswagen claims that "the number of reversals of new trial orders appears to have increased dramatically, especially in cases where the trial court allowed a new trial on grounds that the verdict was against the weight of the evidence." Petn. at 11. *Volkswagen offers absolutely no evidence or authority to support this ipse dixit*

[8] The change has resulted from the elimination of two historical barriers to appellate review. *See generally* 6A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶ 59.08[6], at 59-165 to 59-167 (2d ed. 1989); Recent Decisions, *Appellate Review in the Federal Courts of Orders Granting New Trial*, 13 Stan. L. Rev. 383, 384 n.1 (1961). First, for many years, the motion for a new trial and the judge's ruling thereon were not made part of the record on appeal. By 1933, this practice

(Continued on following page)

Powered Scaffolding, Inc., 836 F.2d 637, 646 (D.C. Cir. 1988); *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5, 6 (1st Cir.), *cert. denied*, 459 U.S. 1087 (1982); *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 523, 541 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); *Consumers Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1097 (3d Cir. 1986); *Abasiekong v. City of Shelby*, 744 F.2d 1055, 1059 (4th Cir. 1984); *Shows v. Jamison Bedding, Inc.*, 671 F.2d 927, 930 (5th Cir. 1982); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523 (6th Cir. 1990); *Spanish Action Comm. of Chicago v. City of Chicago*, 766 F.2d 315, 321 (7th Cir. 1985); *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 415 (8th

---

(Continued from previous page)

had changed. *See Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482 (1933). Second, courts were constrained by section 22 of the Judiciary Act of 1789, 1 Stat. 84, which provided that there should be no reversal "for any error in fact." 6A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶ 59.08[6], at 59-166 (2d ed. 1989); Recent Decisions, *supra*, at 384 n.1. However, this prohibition was removed by the 1948 revision of the Judicial Code. *Id.*

Consequently, Volkswagen's reliance on dicta from several old cases suggesting new trial orders are not reviewable, Petn. at 13-15, 21, is totally misplaced. The historical justifications for those pronouncements are no longer valid. These historical circumstances may also explain some of the language from more recent decisions of the Second Circuit, which cite cases from the era when appellate review was precluded by the practical and statutory limitations mentioned above. Furthermore, as we shall show below, the Second and Fourth Circuits, which Volkswagen characterizes as the two circuits which "consistently adhere to the traditional approach," Petn. at 16 n.9, have not hesitated to reverse new trial orders when they determine that an abuse of discretion has occurred. *See infra* at pp. 20-21.

Cir. 1985); *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 868 (1990); *Patty Precision Prods, Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1251 (10th Cir. 1988); *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1060 (11th Cir. 1982).[9]

Aside from Volkswagen's citations to outmoded case law suggesting trial court rulings on new trial orders are not reviewable, Petn. at 13-14, 21, even Volkswagen does not dispute the uniformly recognized abuse of discretion standard of review. Rather, Volkswagen attempts to demonstrate that while all courts recite abuse of discretion language, some courts "give [the abuse of discretion standard] a completely different meaning." Petn. at 15. As we now show, this is simply not true.

Volkswagen states "courts of appeals that adhere to the traditional view hold that trial courts can and should weigh evidence and credibility when determining whether to grant a new trial." Petn. at 16 (footnote omitted). So do the so-called "revisionists," including the Ninth Circuit in this very case.[10] *Roy v. Volkswagen of Am.*,

---

[9] Some of the cases cited here and elsewhere in the brief deal with conditional new trials pursuant to Federal Rule of Civil Procedure 50(c). For purposes of appellate review, the courts make no distinction between such conditional new trials and new trials ordered pursuant to Federal Rule of Civil Procedure 59. *See also* 9 C. Wright & A. Miller, Federal Practice and Procedure § 2540, at 617 (1971).

[10] The fallacy of Volkswagen's dichotomy is evidenced by Volkswagen's own inability to determine whether certain circuits follow the "traditional" or the "revisionist" approach. According to Volkswagen, the Fifth Circuit follows the traditional approach "occasionally," Petn. at 16 n.9, and the First,

(Continued on following page)

Inc., 896 F.2d at 1176 ("[T]he trial court may weigh the evidence and credibility of the witnesses."); *see also McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339, 344 (8th Cir. 1983) ("It is within the trial court's discretion to grant or deny a new trial based on its reading of the evidence."); *Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982) (" 'Although a trial judge cannot weigh the evidence when confronted with a motion [for judgment] notwithstanding the verdict, in a motion for a new trial the judge is free to weigh the evidence.' " (citation omitted)); *Duncan v. Duncan*, 377 F.2d 49, 52 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967) ("In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence, and 'it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence.' " (citations omitted)).

. .

(Continued from previous page)

Seventh, Ninth and Tenth Circuits "adhere to [the traditional approach] often but not always." *Id.* (Interestingly, one case – *Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986 (1st Cir. 1978) – appears as an example of a traditional, Petn. at 15, as well as a revisionist decision, Petn. at 18. Volkswagen appears to classify decisions from these circuits as "traditional" when they affirm a new trial order and as "revisionist" when they reverse. This result-oriented analysis confirms the fact that the gist of Volkswagen's argument centers on its disagreement with the Ninth Circuit's decision in this particular case and not on any real dispute over the standard of review.

Similarly, Volkswagen claims "a district court may, under the traditional rule, set aside a jury's verdict that is against the great weight of the evidence, even if the verdict is supported by 'substantial evidence.' " Petn. at 16. Once again, the so-called "revisionists" – including the Ninth Circuit in this case – agree. *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176 (" 'The trial court may grant a new trial, even though the verdict is supported by substantial evidence.' "); *see also Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982) (in ruling on a motion for new trial on the ground the verdict is against the great weight of the evidence, the trial court is not required to consider only evidence supporting the jury's verdict); *O'Neil v. W.R. Grace & Co.*, 410 F.2d 908, 913 (5th Cir. 1969) ("We recognize the proposition that a district judge may- . . . grant a new trial for reasons which would not support a judgment notwithstanding a verdict.").

According to Volkswagen, a district court determination that a verdict is against the great weight of the evidence should be conclusive. Petn. at 27 ("Under the traditional rule, [the district court's ruling in this case that the verdict was against the great weight of the evidence] was unassailable."). Whatever may have been the rule in ages past, current law belies Volkswagen's position. While "[t]he authority to grant a new trial . . . is confided *almost* entirely to the exercise of discretion on the part of the trial court," *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (emphasis added), its discretion is not unlimited. As the Ninth Circuit correctly stated in its opinion, "[w]hile the trial court may weigh the evidence and credibility of the witnesses, the court is not justified in granting a new trial 'merely because it might

have come to a different result from that reached by the jury.' " *Roy v. Volkswagen of Am., Inc.*, 896 F.2d at 1176 (quoting *Wilhelm v. Associated Container Transp. (Australia) Ltd.*, 648 F.2d 1197, 1198 (9th Cir. 1981)). The trial judge does not sit as a thirteenth juror:

> [W]hile [the district court judge] has a responsibility for the result no less than the jury, he should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of fact, he would have reached a different result; and in that sense he does not act as a thirteenth juror in approving or disapproving the verdict. Moreover, since the credibility of witnesses is peculiarly for the jury *it is an invasion of the jury's province to grant a new trial merely because the evidence was sharply in conflict.*

6A J. Moore, J. Lucas & G. Grotheer, Jr., Moore's Federal Practice ¶ 59.08[5], at 59-147 to 59-149 (2d ed. 1989) (footnotes omitted) (emphasis added); *see also Payton v. Abbott Labs*, 780 F.2d 147, 153 (1st Cir. 1985) ("The trial judge should not act as a '13th juror' and set aside a verdict simply because he would have reached a different result had he been the trier of fact.").

When the district court *denies* a new trial motion, thereby respecting the jury's verdict, its decision is entitled to greater deference. However, the situation is different when the trial court *grants* a motion for a new trial, thereby nullifying the jury's efforts.[11] As Wright and Miller explain:

---

[11] Volkswagen alleges the "revisionist" courts apply " 'gradations of scrutiny' to new trial orders, depending on

(Continued on following page)

> There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial. In this instance the appellate court is not reexamining facts found by a jury [as is the case when the appellate court reverses an order denying a new trial motion] but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it.

11 C. Wright & A. Miller, Federal Practice and Procedure § 2819, at 126 (1973); *see also Crane v. Consolidated Rail Corp.*, 731 F.2d 1042, 1048 (2d Cir.), *cert. denied*, 469 U.S.

(Continued from previous page)

whether the new trial was granted or denied, and if granted, on the grounds for it." Petn. at 22. If this means that courts consider such factors in determining whether an abuse of discretion has occurred, Volkswagen is correct. If, however, Volkswagen is claiming different courts apply differing standards of review, it is off base. The fact that a court may examine the record with differing degrees of scrutiny under differing circumstances does not mean it is applying different standards of review. *See Williams v. City of Valdosta*, 689 F.2d 964, 974 n.8 (11th Cir. 1982).

Volkswagen also makes repeated references to the fact the jury was exposed to the "horribly disfigured" child, Petn. at 6-8, and suggests this constituted "prejudicial conduct or pernicious behavior," which appellate courts have traditionally recognized as calling for greater deference to the trial court. Petn. at 28; *see also id.* at 25, 29. First, the district court referred only to sympathy and never used the terms "prejudice" or "pernicious behavior." Second, it was *Volkswagen* which asked, during voir dire, that the jury be permitted to see Doug Roy, III, in person and in photographs. Volkswagen even suggested the boy remove his shirt. 10/16/84 R.T. at 6-7. Volkswagen's request came "as a bit of surprise" to Judge Byrne, 10/16/84 R.T. at 7, who presided at voir dire.

854 (1984) (court agrees with "the need of particularly close appellate scrutiny where the trial judge grants a new trial solely because the judge regards the verdict as against the weight of the evidence"); *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969) ("But against [the trial court's] judgment we must consider that the agency to whom the Constitution allocates the fact-finding function in the first instance – the jury – has evaluated the facts differently." (footnote omitted)).

Thus, it has been said that "new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence." *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 363 (5th Cir. 1980); *see also Williams v. City of Valdosta*, 689 F.2d 964, 973 (11th Cir. 1982). Accordingly, a verdict is not against the great weight of the evidence – and a new trial may not be granted – merely because the jury *could have* found for the losing party.

Volkswagen also suggests that many "revisionist" courts confuse the standard of review applicable to new trial orders with that applicable to judgments notwithstanding the verdict. Petn. at 18-19, 27 n.12. In fact, cases Volkswagen cites expressly recognize the distinction. *See Rosenfield v. Wellington Leisure Prods., Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987); *J & H Auto Trim Co. v. Bellefonte Ins. Co.*, 677 F.2d 1365, 1373 n.12 (11th Cir. 1982); *Fireman's Fund Ins. Co. v. Aalco Wrecking Co.*, 466 F.2d 179, 186-87 (8th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973). It is also worth noting that even courts classified as "traditional" by Volkswagen cite JNOV cases. *See, e.g., Landes Constr.*

Co. v. Royal Bank of Canada, 833 F.2d 1365, 1372 (9th Cir. 1987) (citing *Tennant v. Peoria and Pekin Union Ry.*, 321 U.S. 29, 35 (1944)). To suggest that "revisionist" courts are not aware of the difference between the standard of review for judgments notwithstanding the verdict and for new trial orders is ludicrous. While some appellate courts may on occasion use loose language, it does not follow that they are unaware of the standards.

Thus, there is no dispute regarding the standard of review to be applied. All courts "recognize[ ] the deference that is due the trial court's first-hand experience of the witnesses, their demeanor, the context of the trial, and the like." *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360, 362 (5th Cir. 1980); *see also Rosenfield v. Wellington Leisure Prods, Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987). Nevertheless, when an abuse of discretion is shown, courts in *all* circuits – including those purporting to take a pure hands-off approach – have reversed new trial orders grounded on the weight of the evidence. *See, e.g., McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637 (D.C. Cir. 1988); *Coffran v. Hitchcock Clinic, Inc.*, 683 F.2d 5 (1st Cir.), *cert. denied*, 459 U.S. 1087 (1982); *Berner v. British Commonwealth Pac. Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966); *Lind v. Schenley Indus., Inc.*, 278 F.2d 79 (3d Cir.), *cert. denied*, 364 U.S. 385 (1960); *Abasiekong v. City of Shelby*, 744 F.2d 1055 (4th Cir. 1984); *Conway v. Chemical Leaman Tank Lines, Inc.*, 610 F.2d 360 (5th Cir. 1980); *Duncan v. Duncan*, 377 F.2d 49 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967); *Continental Air Lines, Inc. v. Wagner-Morehouse, Inc.*, 401 F.2d 23 (7th Cir. 1968); *McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339 (8th Cir. 1983); *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336

(9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985); *Moore v. Shultz*, 491 F.2d 294 (10th Cir.), *cert. denied*, 419 U.S. 930 (1974); *Watts v. Great Atl. and Pac. Tea Co.*, 842 F.2d 307 (11th Cir. 1988).

Naturally, the circuits cannot be totally uniform in their application of the abuse of discretion standard. Judgment as to what constitutes an abuse of discretion necessarily varies. These variations are inherent in the indefinable notion of "discretion." As Wright and Miller explain, "[i]t may be doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions [for new trial based on weight of the evidence]. Necessarily all such formulations are couched in broad and general terms that furnish no unerring litmus for a particular case." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2806, at 48-49 (1973).

In sum, there is no conflict among the circuits regarding the applicable standard of review. The Ninth Circuit's decision in this case was squarely in step with the uniformly accepted standard.[12]

---

[12] Volkswagen alleges the existence of a conflict *within* the Ninth Circuit and cites that alleged conflict as a reason supporting the granting of its petition. Petn. at 25-29; *see also id.* at 15 (referring to a "hodge-podge" of standards within circuits).

First, there is no such intracircuit conflict. In response to Volkswagen's petition for rehearing with suggestion for rehearing en banc, not a single judge requested a vote to rehear the matter en banc. *Roy v. Volkswagen of Am., Inc.*, 920 F.2d at 619. The judges of the Ninth Circuit apparently felt there was no intracircuit conflict worthy of consideration.

(Continued on following page)

CONCLUSION

The United States Court of Appeals for the Ninth Circuit followed its mandate. For all the foregoing reasons, Volkswagen's petition for a writ of certiorari should be denied.

Respectfully submitted,

LAW OFFICES OF DAVID M. HARNEY
HORVITZ & LEVY
BARRY R. LEVY*
MITCHELL C. TILNER
15760 Ventura Boulevard, 18th Floor
Encino, California 91436
(818) 995-0800 and (213) 872-0802

Attorneys for Respondents

*Counsel of Record

(Continued from previous page)

Second, even if there were a conflict within the Ninth Circuit, review here would be unwarranted. Although this Court has on occasion mentioned intracircuit conflict in granting a writ of certiorari, such a conflict is generally not a sufficient basis for granting the writ. *See* J. Harlan, *Manning the Dikes*, 13 Record of N.Y.C. B.A. 541, 552 (1958) (quoted in R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice 205 (6th ed. 1986)) ("Decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself."); *see also* Sup. Ct. R. 10 (intracircuit conflict not listed as ground for obtaining review).

APPENDIX

RICHARD L. ACKERMAN
MICHAEL A ZUK
ROY D. GOLDSTEIN
HERZFELD & RUBIN
1925 Century Park East
Suite 600
Los Angeles, California 90067-2783
(213) 553-0451

and

ROBERT E. KING
LAW OFFICES OF ROBERT E. KING
5329 Office Center Court, Suite 200
Bakersfield, CA 93309
(805) 322-6222

Attorneys for Defendant
VOLKSWAGEN OF AMERICA, INC. and
VOLKSWAGEN WERK AKTIENGESELLSCHAFT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOUG ROY, JR., etc., et al. Plaintiffs, vs. VOLKWAGENWERK AKTIENGESELLSCHAFT, a German Corporation, and VOLKSWAGEN OF AMERICA, INC. Defendants.	CASE NO. CV 83 5254 JWC JOINT NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT DEFENDANTS VOLKSWAGEN OF AMERICA, INC. and VOLKWAGENWERK AKTIENGESELLSCHAFT, appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the United States District Court, Central District of California, on January 28, 1991, reinstating the November 28, 1984 judgment entered in favor of plaintiffs' following verdict upon jury trial. That initial judgment was vacated by an Order of the United States District Court for the Central District of California, timely filed January 4, 1985 and entered January 7, 1985, granting a new trial. The United States Court of Appeals for the Ninth Circuit reversed the new trial order, and ordered the original judgment reinstated. The mandate issued on January 16, 1991 and the judgment on the original trial verdict was entered on January 28, 1991.

DATED: February 14, 1991.

RICHARD L. ACKERMAN
MICHAEL A. ZUK
ROY D. GOLDSTEIN

By: /s/ Michael A. Zuk
Michael A. Zuk
Attorneys for Defendants
VOLKSWAGEN OF
AMERICA, INC.
and VOLKWAGENWERK
AKTIENGESELLSCHAFT

MOTION FILED
APR 17 1991

No. 90-1464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VOLKSWAGEN OF AMERICA, INC., ET AL.,
PETITIONERS

v.

DOUG ROY, JR., ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

ARTHUR R. MILLER
Langdell Hall
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

KENNETH S. GELLER
Counsel of Record
MARK I. LEVY
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1464

VOLKSWAGEN OF AMERICA, INC., ET AL.,
PETITIONERS

v.

DOUG ROY, JR., ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Product Liability Advisory Council, Inc. ("PLAC"), respectfully requests leave to file the accompanying brief as *amicus curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has declined consent.

PLAC is a non-profit membership association of approximately 80 major industrial companies.[1] Formed in 1983,

[1] PLAC members include: American Home Products Corporation; American Telephone & Telegraph Company; Amoco Corporation; Amsted Industries, Inc.; Anheuser-Busch Companies, Inc.; Association of International Automobile Manufacturers, Inc.; The Boeing

(Footnote continued on following page)

PLAC's principal purpose is to submit briefs as *amicus curiae* in appellate cases involving significant issues affecting the law of product liability. PLAC has participated as *amicus curiae* in numerous cases in this Court, the federal courts of appeals, and state appellate courts.

PLAC and its members have a strong interest in the development of sound legal principles governing procedural and substantive issues arising in product liability

---

[1] *continued*

Company; Bridgestone/Firestone, Inc.; The Budd Company; Caterpillar, Inc.; Chrysler Corporation; Clark Material Handling Company; The Coca-Cola Company; The Coleman Company; Dana Corporation; Deere & Company; Defense Research Institute; Digital Equipment Corporation; Dow Chemical Company; Eaton Corporation; Exxon Corporation; FMC Corporation; Federal-Mogul Corporation; Ford Motor Company; Freightliner; The Gates Corporation; General Electric Company; General Motors Corporation; Goodyear Tire & Rubber Company; Gravely International, Inc.; Great Dane Trailers, Inc.; Harnischfeger Industries, Inc.; Hoechst Celanese; Honda North America, Inc.; Hyundai Motor America; Ingersoll-Rand Company; Isuzu Motors, America, Inc.; Johnson Controls, Inc.; Joy Technologies, Inc.; Kawasaki Motors Corp., U.S.A.; Eli Lilly and Company; Melroe Company; Mercedes-Benz of North America, Inc.; Merck & Company, Inc.; Michelin Tire Corporation; Miller Brewing Company; Minnesota Mining and Manufacturing Company; Mitsubishi Motor Sales of America; Monsanto Company; O.F. Mossberg & Sons, Inc.; Motor Vehicle Manufacturers Association of the United States, Inc.; Navistar International Transportation Corp.; New United Motor Manufacturing, Inc.; Nissan Motor Corporation, U.S.A.; Otis Elevator Company; PACCAR, Inc.; Philip Morris Companies, Inc.; Piper Aircraft Corporation; Pirelli Armstrong Tire Corporation; Playtex Family Products Corp., Inc.; Porsche Cars North America, Inc.; Procter & Gamble Company; RJR Nabisco, Inc.; Rockwell International; Schindler Elevator Corporation; Snap-on Tools Corporation; Squibb Corporation; Sturm, Ruger and Company; Subaru of America, Inc.; TRW, Inc.; Toyota Motors Sales, U.S.A., Inc.; U-Haul International; Union Carbide Corporation; Unocal Corporation; The Upjohn Company; U.S. Tobacco; USX Corporation; Volkswagen of America, Inc.; Volvo North America Corporation; Vulcan Materials; Jervis B. Webb Company; Whirlpool Corporation; Yamaha Motor Corporation, U.S.A.

cases. In particular, PLAC is vitally concerned about the questions presented by petitioners regarding the trial-court and appellate standards applicable to motions for a new trial on the ground that the jury's verdict represents a miscarriage of justice. Such motions provide a critical safeguard in the legal system for the correction of erroneous and unjustified jury verdicts. PLAC's members have been involved in many product liability and other cases, and they necessarily depend upon the remedy of a new trial to rectify mistakes and abuses in the jury trial process.

Because of PLAC's substantial interest in the outcome of this case, and because of its extensive experience in product liability suits, PLAC is able to provide an additional and broader perspective on the important issues raised by petitioners. PLAC believes that the accompanying *amicus* brief will be of assistance to the Court in considering the petition for a writ of certiorari.

For the foregoing reasons, the motion of the Product Liability Advisory Council, Inc., for leave to file the accompanying brief as *amicus curiae* in support of petitioners should be granted.

Respectfully submitted.

ARTHUR R. MILLER
Langdell Hall
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

KENNETH S. GELLER
Counsel of Record
MARK I. LEVY
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

APRIL 1991

TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS CURIAE	1
ARGUMENT	2
I. THE PETITION PRESENTS IMPORTANT AND RECURRING ISSUES THAT WARRANT THIS COURT'S REVIEW	2
II. THE NINTH CIRCUIT CLEARLY ERRED IN UNDERTAKING DE NOVO REVIEW OF THE DISTRICT COURT'S EXERCISE OF ITS NEW-TRIAL DISCRETION	4
III. THE NEW-TRIAL PROTECTION AGAINST RUNAWAY JURIES IS ESPECIALLY IMPORTANT IN PRODUCT LIABILITY CASES	9
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:	PAGE
Allied Chemical Corp. v. *Daiflon, Inc.*, 449 U.S. 33 (1980)	4, 5, 7
Browning-Ferris Industries v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989)	7
Business Guides, Inc. v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991)	4
Cone v. *West Virginia Paper Co.*, 330 U.S. 212 (1947)	5, 6, 7
Cooter & Gell v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990)	4
Demarest v. *Manspeaker*, 111 S. Ct. 599 (1991)	4
Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933)	7
FirsTier Mortgage Co. v. *Investors Mortgage Insurance Co.*, 111 S. Ct. 648 (1991)	4
Lynch v. *Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir. 1987)	9
Mauro v. *Raymark Industries, Inc.*, 116 N.J. 126, 561 A.2d 257 (1989)	10
McDonough Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548 (1984)	5
Montgomery Ward & Co. v. *Duncan*, 311 U.S. 243 (1940)	6
Pavelic & LeFlore v. *Marvel Entertainment Group*, 110 S. Ct. 456 (1989)	4

Richardson v. *Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), cert. denied, 110 S. Ct. 218 (1989) 9

Salve Regina College v. *Russell*, No. 89-1629 (Mar. 20, 1991) 4, 6, 7

United States v. *Johnson*, 327 U.S. 106 (1946) ... 6, 8

MISCELLANEOUS:

Epstein & Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 SETON HALL L. REV. 656 (1987) 10

Fed. R. Civ. P. 59 ..... 3, 8, 11

D. Hensler, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS (Rand/Institute for Civil Justice 1987) 9

P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) 10

E. McGuire, THE IMPACT OF PRODUCT LIABILITY (The Conference Board 1988) 10, 11

6A J. Moore, J. Lucas, & G. Grotheer, MOORE'S FEDERAL PRACTICE (2d ed. 1989):

¶ 59.05[1] 5

¶ 59.05[2] 7

¶ 59.08[1] 5

¶ 59.08[5] 9

¶ 59.15[3] 3-4, 8

United States Dept. of Justice, Tort Policy Working Group, AN UPDATE ON THE LIABILITY CRISIS (1987) 9, 10

11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL (1973):

§ 2801 5

§ 2803 ..... 3, 7

§ 2806 ..... 5, 9

§ 2818 ..... 3, 7, 8

§ 2819 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1464

VOLKSWAGEN OF AMERICA, INC., ET AL.,
PETITIONERS

v.

DOUG ROY, JR., ET AL.,
RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

As explained in more detail in the accompanying motion for leave to file this brief as *amicus curiae*, the Product Liability Advisory Council, Inc. ("PLAC"), is an association of major industrial companies formed for the purpose of filing *amicus* briefs in cases involving significant issues affecting the procedural and substantive law applicable in product liability cases. PLAC and its members have a substantial interest in the questions presented by petitioners: the trial-court and appellate standards applicable to motions for a new trial. Based on its extensive experience in product liability litigation, PLAC believes that its participation as *amicus curiae* in this case will provide an

additional and broader perspective that will be of assistance to the Court in considering the petition for a writ of certiorari.

ARGUMENT

I. THE PETITION PRESENTS IMPORTANT AND RECURRING ISSUES THAT WARRANT THIS COURT'S REVIEW

As the district court recognized, this is a compelling case for the grant of a new trial. The jury's verdict in favor of respondents was contrary to the "great weight of evidence" (Pet. App. 6A), including uncontroverted physical evidence that established that respondents' purported eyewitnesses *could not* have seen the "essential" (*id.* at 5A) fact disputed at trial: whether respondents' van was on the pavement or the unimproved shoulder of the highway when the accident occurred. See *id.* at 5A-6A; Pet. 4-5 & n.2. In addition, although it initially denied petitioners' request for bifurcation of the issues of liability and damages, the district court determined at the conclusion of the trial that the jury had been "obviously swayed by emotion and sympathy" resulting from the "graphic and explicit" evidence of the gruesome injuries suffered by respondent Doug Roy, III; this "emotion * * * pervaded" the case and "overwhelmed the jury, obscuring the issue of liability." Pet. App. 6A.

Accordingly, based on his intimate familiarity with and personal observation of the trial proceedings, the district judge stated that "after much careful consideration, I can only conclude that the verdict is so contrary to common sense and the overwhelming weight of the evidence that I cannot in good conscience permit [it] to remain." Pet. App. 2A. To "allow the verdict to stand" in the face of the great weight of the evidence to the contrary, the court

emphasized, "would constitute a serious miscarriage of justice." *Id.* at 7A. The wisdom of the district court's ruling is confirmed by the outcome of the retrial, at which the jury—after hearing essentially the same evidence on liability, but free from the prejudicial effect of the inflammatory damages evidence—returned a unanimous verdict for petitioners. The court of appeals' reinstatement of the initial verdict thus represents, as the district court found, a "serious miscarriage of justice" and defies both "common sense and the overwhelming weight of the evidence."

Much more is involved here, however, than just the grievous unfairness of the unfounded $3 million judgment against petitioners. Rather, this case presents important and recurring legal issues on which the courts of appeals are deeply divided: the proper relationship between trial courts and juries, and that between trial and appellate courts, in the adjudication of new-trial motions. The petition demonstrates at length the disarray and confusion that mark the lower courts' approach to new-trial issues under Rule 59 of the Federal Rules of Civil Procedure. In particular, "[t]here are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial." 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2818, at 118 (1973).

Under traditional standards, an appellate court's reversal of the grant of a new trial was virtually unprecedented. "In most instances in which trial courts grant a new trial they are right in doing so," and "it does not appear that in more than about one case a year a new trial is granted and the appellate court ultimately reinstates the verdict at the first trial." Wright & Miller, *supra*, § 2803, at 34. See also 6A J. Moore, J. Lucas, and G. Grotheer, MOORE'S FEDERAL PRACTICE ¶ 59.15[3], at

59-303 (2d ed. 1989) (grounds for reversal of district court's new-trial ruling "can rarely be shown"). As the petition shows, however, despite that historical practice appellate courts increasingly are reversing trial judges' rulings on new-trial motions—a trend that is wrong on the merits and of great practical significance to the federal judicial system.

New-trial issues arise routinely in federal litigation (*Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980)), and both sound judicial administration and fairness to litigants require that a uniform standard be established and followed by federal courts around the country. In a variety of cases, this Court has granted certiorari to resolve the legal standards that govern the federal courts' disposition of significant and recurrent procedural issues. See, *e.g.*, *Salve Regina College* v. *Russell*, No. 89-1629 (Mar. 20, 1991); *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991); *FirsTier Mortgage Co.* v. *Investors Mortgage Insurance Co.*, 111 S. Ct. 648 (1991); *Demarest* v. *Manspeaker*, 111 S. Ct. 599 (1991); *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447 (1990); *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 110 S. Ct. 456 (1989). The need for clarity and national uniformity is as great in this area of the law as it was in each of those areas, and review is equally warranted here.

II. THE NINTH CIRCUIT CLEARLY ERRED IN UNDERTAKING DE NOVO REVIEW OF THE DISTRICT COURT'S EXERCISE OF ITS NEW-TRIAL DISCRETION

As judges and litigators know from common experience, juries are not infallible and, for no evident or explicable reason, sometimes reach unjustified results. Indeed, the principle allowing courts to set aside verdicts as against

the weight of the evidence is premised on the recognition that jurors can go astray and that unsupported verdicts must be corrected if litigation is to be preserved as a fair and rational process for resolving disputes. Thus, the new-trial remedy is inherent in, and in no way inconsistent with, the jury trial system.

> [T]he trial judge does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it.

Wright & Miller, *supra*, § 2806, at 49. See also *id.* § 2801, at 28-29, § 2806, at 45; Moore, *supra*, ¶ 59.05[1], at 59-39 (Lord Mansfield stated in 1757 that "[t]rials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials") (emphasis omitted), ¶ 59.08[1], at 59-81 ("the trial court's power to grant a new trial is broad and ample to the end that an unjust verdict should not stand; and, when the power is wisely used, it prevents a miscarriage of justice, and makes jury trials instruments of justice, without in the slightest invading the common law function of juries or the constitutional right of jury trial").

Consistent with the historical origins of the new-trial remedy, federal law has long entrusted a special role on such issues to the district judge who presided at the trial and observed the proceedings firsthand. As this Court recently admonished, "[t]he authority to grant a new trial * * * is confided almost entirely to the exercise of discretion on the part of the trial court." *Allied Chemical Corp.*, 449 U.S. at 36. See also, *e.g.*, *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984) ("[g]enerally, motions for a new trial are committed to the discretion of the district court"); *Cone* v. *West Virginia Paper*

Co., 330 U.S. 212, 218 (1947) ("the primary discretionary responsibility for * * * decision [of a new-trial claim] rests on the District Court"); *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 251-252 (1940) ("The motion for a new trial may invoke the discretion of the [district] court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence * * * or that, for other reasons, the trial was not fair to the party moving * * *. [A new-trial motion] appeal[s] to the discretion of the [trial] judge").

This broad discretionary authority reflects the recognition that the district judge is uniquely qualified to assess new-trial issues. Having conducted the trial, "he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. * * * Determination of whether a new trial should be granted * * * calls for the judgment in the first instance of the judge who saw and heard the witnesses" and therefore has "a perspective peculiarly available to him alone." *Cone*, 330 U.S. at 216. See also, *e.g.*, *United States* v. *Johnson*, 327 U.S. 106, 112 (1946) (the trial judge "had conducted the original trial and had watched the case * * * unfold from day to day," and "[c]onsequently [he] was exceptionally qualified to pass on the [new-trial motion]"); *Salve Regina College*, slip op. 6 (district courts "devote much of their energy and resources to hearing witnesses and reviewing evidence"). The new-trial authority also affords the district judge "an opportunity, after all his rulings have been made and all the evidence has been evaluated, * * * 'to correct his own errors without the delay, expense or other hardships of an appeal.' " *Cone*, 330 U.S. at 216 (citation omitted).

In line with the broad discretion vested in the district court, the scope of appellate review is correspondingly narrow. The court of appeals "review[s] the [d]istrict

[c]ourt's determination under an abuse of discretion standard" and must give "proper deference to the [d]istrict [c]ourt." *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2922 (1989). See also Wright & Miller, *supra*, § 2803, at 32-33 ("the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited"). Underlying this deferential abuse-of-discretion standard is the practical fact that the district judge "has the feel of the case which no appellate printed transcript can impart." *Cone*, 330 U.S. at 216. See also Wright & Miller, *supra*, § 2818, at 119-120 ("there is considerable deference by the appellate court to the action of the trial court" because "[t]he trial judge was on the spot"), § 2819, at 127 ("the appellate court must defer to the better opportunity the trial judge has to appraise the situation"); Moore, *supra*, ¶ 59.05[2], at 59-44 ("the grant or denial of a new trial is primarily addressed to the sound discretion of the trial court, which normally has a feel for the case that an appellate court usually does not have"); cf. *Salve Regina College*, slip op. 8 (deferential abuse-of-discretion review is appropriate both for "issues involving supervision of litigation" and for "mixed questions of law and fact * * * when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine").[1]

Unfortunately, as the petition demonstrates, these pronouncements by the Court have not proven sufficient to restrain some courts of appeals, which subject new-trial

[1] The need for deferential appellate review is reinforced by the fact that district courts are not required to, and often do not, state findings of fact and conclusions of law in ruling on new-trial motions. See *Allied Chemical Corp.*, 449 U.S. at 36 n.3; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933).

rulings to exacting scrutiny and frequent reversal. In this case the Ninth Circuit expressed the applicable legal standard as follows: "[T]he trial court abuses its discretion in ordering a new trial * * * if the jury's verdict is not clearly against the weight of the evidence." Pet. App. 12B. Thus, the court below did not review—let alone defer to—the district court's exercise of discretion but instead undertook to decide for itself whether the verdict was against the great weight of the evidence. Such a *de novo* appellate determination was fundamentally erroneous. See *Johnson*, 327 U.S. at 113 (the court of appeals does "not sit to try de novo motions for a new trial," and the court "was wrong * * * when it did review the facts de novo").

The court of appeals' error is particularly manifest with respect to the district court's grant of a new trial on the ground of jury sympathy and prejudice. Unlike the court of appeals, which neither saw respondents' injuries nor even had the photographs of those injuries before it (see Pet. 7-8 & n.5), the district court sat through the entire trial, viewed the evidence as it was presented, and, most important, was able to observe the jurors' reactions. Based on this exposure, the experienced trial judge concluded that the jury was "obviously swayed by emotion and sympathy" and that "the emotion * * * overwhelmed the jury, obscuring the issue of liability." Pet. App. 6A. The district court's determination of jury sympathy for respondents and unfair prejudice to petitioners is a paradigmatic example of a new-trial ruling that is peculiarly within the competence of the trial judge. See Wright & Miller, *supra*, § 2818, at 119-120; Moore, *supra*, ¶ 59.15[3], at 59-308. The Ninth Circuit's reinstatement of the jury's verdict in these circumstances is flatly inconsistent with the purposes of Rule 59.[2]

[2] As petitioners explain (Pet. 27 n.12), the court of appeals ignored the distinction between a new-trial motion and a motion for

(Footnote continued on following page)

III. THE NEW-TRIAL PROTECTION AGAINST RUNAWAY JURIES IS ESPECIALLY IMPORTANT IN PRODUCT LIABILITY CASES

The new-trial protection against runaway juries is especially important in product liability and other tort suits. These cases often confront the jury with a severely injured and needy plaintiff, on the one hand, and a "deep pocket," impersonal, and out-of-state corporate defendant, on the other. In choosing between such litigants, the "natural response of the human spirit" is compassion and sympathy for the aggrieved individual. *Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823, 832 (D.C. Cir. 1988), cert. denied, 110 S. Ct. 218 (1989). See also, *e.g.*, *Lynch* v. *Merrell-National Laboratories*, 830 F.2d 1190, 1196 (1st Cir. 1987); United States Dept. of Justice, Tort Policy Working Group, AN UPDATE ON THE LIABILITY CRISIS 54 n.75 (1987) ("DOJ UPDATE") (discussing "deep pocket" jury behavior). While such human empathy is understandable, to allow it to sustain the jury's verdict, despite overwhelming factual evidence supporting the contrary result, is antithetical to the basic precept of the rule of law.

The economic costs of unfounded jury verdicts in product liability cases, as here, have become staggering. In recent years there has been an "extraordinary growth in civil jury awards" in such cases. DOJ UPDATE at 33. See also D. Hensler, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 18 (Rand/Institute for Civil Justice 1987) (the growth in the average award in product

---

[2] *continued*
judgment notwithstanding the verdict. That error typifies "the recurrent tendency on the part of courts to confuse the standard for a new trial with that for a directed verdict or a judgment notwithstanding the verdict. This has * * * consequences * * * [that] are undesirable." Wright & Miller, *supra*, § 2806, at 42. See also Moore, *supra*, ¶ 59.08[5], at 59-142.

liability suits "has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent"). Today, it is not uncommon for damages awards of millions of dollars—and in some instances tens of millions of dollars or more—to be returned by juries and upheld by courts in product liability actions. See, *e.g.*, P. Huber, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 127 (1988).

The enormous costs that grow out of unsupported claims raise profound problems for our nation by adversely affecting consumer welfare and business productivity. Unjustified liabilities clearly "exact[ ] a societal cost in the form of higher insurance premiums and higher product costs." *Mauro* v. *Raymark Industries, Inc.*, 116 N.J. 126, 143, 561 A.2d 257, 266 (1989). Furthermore, not only can such liabilities "add significantly to the cost of a product," but in fact they can completely "drive a vital product or class of products from the marketplace." Epstein & Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 SETON HALL L. REV. 656, 661 (1987). See also DOJ UPDATE at 19-20. Thus, " '[i]ronically, the victims of the excesses of the product liability system [are] the consumers, the very persons the system purports to protect.' " E. McGuire, THE IMPACT OF PRODUCT LIABILITY 17 (The Conference Board 1988).

Liability risks also have had a debilitating effect on new product development. A 1988 Conference Board survey of 4,000 companies in the United States found that "potential liability risks" have "had a significant impact on corporate America." McGuire, *supra*, at vii. Indeed, "a third of all the firms surveyed—and nearly half of those reporting major impacts—have decided against introducing new products because of liability fears." *Id.* at 17. In explaining this chilling effect on product development, one CEO noted: "The threat of enormous and unpredictable liabil-

ity continues to weigh heavily in our decisions relating to the development of new products and to improvements to existing ones. * * * As a result, valuable products whose potential profitability is outweighed by the risk of enormous liability never see the light of day." *Id.* at 18.

In sum, this case represents a particularly egregious instance of the much larger systemic problem of runaway juries that the new-trial remedy is designed to correct. Rule 59 is intended to be an essential safeguard against jury verdicts that are against the great weight of the evidence or the product of prejudice and emotion. The Ninth Circuit, however, has rendered that important protection virtually useless. Because, as the petition demonstrates, the lower federal courts are in complete disagreement over what inherently should be a uniform national standard under Rule 59, review by this Court is plainly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ARTHUR R. MILLER
Langdell Hall
1545 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4111

KENNETH S. GELLER
Counsel of Record
MARK I. LEVY
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 463-2000

Counsel for Amicus Curiae
Product Liability Advisory Council, Inc.

APRIL 1991

No. 90-1464

Supreme Court, U.S.
FILED
APR 30 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

VOLKSWAGEN OF AMERICA, INC., ET AL.,

Petitioners,

v.

DOUG ROY, JR., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVID M. HEILBRON*
LESLIE G. LANDAU
ANNE O. HANNA
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

Attorneys for Petitioners

*Counsel of Record

McCUTCHEN, DOYLE,
BROWN & ENERSEN
Of Counsel

HERZFELD & RUBIN, P.C.
HERBERT RUBIN
MICHAEL HOENIG
IAN CERESNEY
DANIEL GSOVSKI
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

I. THE SUPREME COURT'S TEACHINGS 2

II. THE CASES CONFLICT ON THE RIGHTS AND LIMITS OF THE TRIAL AND APPELLATE COURTS IN RULING ON AND REVIEWING NEW TRIAL MOTIONS 3

A. The Conflict On The Power Of Trial Courts To Order New Trials 3

B. The Conflict On The Scope Of Appellate Courts' Review Of New Trial Orders 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176 (9th Cir. 1989), cert. denied, 110 S. Ct. 868 (1990) 6

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980) 2, 10

Berkovich v. Hicks, 922 F.2d 1018 (2d Cir. 1991) 6

Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965) 6

Bonura v. Sea Land Service, Inc., 505 F.2d 665 (5th Cir. 1974) 4

Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 2

Consumers' Power Co. v. Curtiss-Wright Corp., 780 F.2d 1093 (3d Cir. 1986) 3

Eyre v. McDonough Power Equip., Inc., 755 F.2d 416 (5th Cir. 1985) 6

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933) 2

Goldsmith v. Diamond Shamrock Corp., 767 F.2d 411 (8th Cir. 1985) 3

Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365 (9th Cir. 1987) 6

McGee v. South Pemiscot School District, 712 F.2d 339 (8th Cir. 1983) 3

McNeal v. Hi-Lo Powered Scaffolding, Inc., 836 F.2d 637 (D.C. Cir. 1988) 4

Narcisse v. Illinois Central Gulf Railroad Co., 620 F.2d 544 (5th Cir. 1980) 3, 4

TABLE OF AUTHORITIES – Continued

Page

Newmont Mines, Ltd. v. Hanover Ins. Co., 784 F.2d 127 (2d Cir. 1986) 6

Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co., 846 F.2d 1247 (10th Cir. 1988) 6

Payton v. Abbott Labs, 780 F.2d 147 (1st Cir. 1985) 3

Phoenix v. Com/Systems, Inc., 706 F.2d 1033 (9th Cir. 1983) 6

Portage II v. Bryant Petroleum Corp. 899 F.2d 1514 (6th Cir. 1990) 4

Portman v. American Home Prods. Corp., 201 F.2d 847 (2d Cir. 1953) 5

Rios v. Empresas Lineas Maritimas Argentinas, 575 F.2d 986, 990 (1st Cir. 1978) 3

Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493 (11th Cir. 1987) 4

Roy v. Volkswagen Aktiengesellschaft, 600 F. Supp. 653 (C.D. Cal. 1985) 8, 9

Roy v. Volkswagen of America, 896 F.2d 1174 (9th Cir. 1990) 7

United States v. Johnson, 327 U.S. 106 (1946) 2

STATUTES AND CODES

Federal Rule of Civil Procedure 59 ..... 1, 2, 3

MISCELLANEOUS

11 C. Wright & A. Miller, Federal Practice and Procedure, § 2806, p. 42 7

6A J. Moore, Moore's Federal Practice §59.15[3] at 59-309-10 2

INTRODUCTION

The Roys say "there is no conflict among the circuits," and urge that Volkswagen's petition be denied. Respondents' Brief in Opposition ("Opp."), p. 21. But the Roys avoid the issues. They blur the distinction between the duties and roles of trial and appellate courts, and so obscure the very issue before the court – whether the traditional roles and duties should be, in effect, reversed, as they have been in this case and in some other circuits. The Roys do not come to grips with the cases that present the conflict squarely, and indeed, ignore their own argument to the Ninth Circuit, which recognized the conflict and urged the Ninth Circuit to apply the more restrictive revisionist standard.

The conflict is real, and affects every case tried in the federal courts. As Professor Arthur Miller, representing *amicus curiae* the Product Liability Advisory Counsel, puts it, "the lower federal courts are in complete disagreement over what inherently should be a uniform federal standard under Rule 59." Brief of Amicus Curiae in Support of Petitioners, p. 11.[1] This Court never has addressed the standards for trial and appellate court review of new trial motions under Federal Rule of Civil Procedure 59. It should do so now. It should confirm that while trial courts have discretion, appellate courts cannot arrogate that discretion to themselves and, in effect, act like trial courts, particularly where the trial court found a "serious miscarriage of justice."

ARGUMENT

The Roys say the trial and appellate courts' roles are "inseparably linked," Opp. p. 12 n.6, and then do not discuss the differences between them. That obscures the very problem at issue – what the appropriate standard of

---

[1] Ironically, the Roys say Professor Miller agrees with them. Opp., pp. 12, 14, 18, 21.

review is, and the revisionist courts' failure to adhere to it, and to the traditional and proper allocation of functions between trial and appellate courts, based on what each is best situated to decide. That is the problem. The Roys do not address it.

I. THE SUPREME COURT'S TEACHINGS.

The Roys dismiss as "dicta" and "outmoded" this Court's advice on the proper roles of appellate and trial courts in deciding new trial issues based on the weight of evidence and prejudice. Opp., pp. 13 n.8, 14. According to the Roys, the Court's decisions predate the 1933 advent of the practice of including new trial orders in the record, and a 1948 change in the Judiciary Code. Opp., pp. 12-13 n.8. Accordingly, the Roys argue, the Court's teachings in *Fairmount Glass, Cone,* and *Johnson* should be disregarded entirely. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947); *United States v. Johnson*, 327 U.S. 106, 111-12 (1946). But the Court observed as recently as 1980 that an appellate court's review, if any, is very limited: "the authority to grant a new trial . . . is confided *almost entirely* to the exercise of discretion on the part of the trial court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Moreover, the principles underlying the Court's earlier decisions (principles the Roys ignore) still hold true today: Trial courts, which have a "feel of the case that no appellate printed transcript can impart," are far better equipped than appellate courts to assess the evidence. *Cone*, 330 U.S. at 216. Accordingly, the commentators believe the cases based on those principles should apply to appellate review of new trial orders under Rule 59. *See, e.g.*, 6A J. Moore, *Moore's Federal Practice* §59.15[3] at 59-309-10 ("The rule of [*Johnson*] seems applicable to motions for new trials in civil actions.").

All this is, ultimately, beside the point. The Court, not the Roys, should decide whether the time-tested principles it has endorsed for the roles of trial and appellate courts apply to new trial motions under Rule 59, or have been abandoned. If anything, the Roys' argument that the Court has said nothing relevant on the issue underscores the need for a definitive ruling from the Court.

II. THE CASES CONFLICT ON THE RIGHTS AND LIMITS OF THE TRIAL AND APPELLATE COURTS IN RULING ON AND REVIEWING NEW TRIAL MOTIONS.

A. The Conflict On The Power Of Trial Courts To Order New Trials.

Traditional cases hold that trial courts may weigh evidence and assess credibility in ruling on new trial motions. The Roys agree that this should be the rule everywhere, and say that it is. Opp., 14-15.[2]

But some revisionist courts of appeals have held that trial courts deciding new trial motions may not weigh credibility. For example, the Third Circuit recently held: "A dispute over credibility will not justify a new trial." *Consumers' Power Co. v. Curtiss-Wright Corp.*, 780 F.2d 1093, 1097 (3d Cir. 1986) (*citing Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986, 990 (1st Cir. 1978)). *See also Narcisse v. Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980); *McGee v. South Pemiscot School District*, 712 F.2d 339, 344 (8th Cir. 1983); *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985). *See* Petition, pp. 17-18.

---

[2] The Roys point out that the trial court should not grant a new trial simply because the judge "would have reached a different result had he been the trier of fact." Opp., p. 17 (*quoting Payton v. Abbott Labs*, 780 F.2d 147, 153 (1st Cir. 1985)); *see also* Opp., pp. 16, 19. We agree; that does not change the rule that the trial court may grant a new trial upon finding the verdict contrary to the great weight of the evidence.

The Roys do not address these cases, or the conflicting rule they announce. That is odd, particularly since the Roys themselves cited these very cases to the Ninth Circuit in opposing rehearing, and argued that "some courts have suggested that trial courts should not issue a new trial order based merely on credibility grounds." Response to Petition for Rehearing With Suggestion for Rehearing En Banc, p. 10 n.6.

Traditional cases hold that a trial court may order a new trial even where "substantial evidence" supports the jury's verdict. Petition, pp. 16-17. Again, the Roys agree that this should be the rule everywhere, and say that it is. Opp., p. 16.

But some revisionist courts deny the right to grant a new trial "as long as there is *some support* for the jury's decision." *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493, 1498 (11th Cir. 1987) (emphasis added). *See also Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1524 (6th Cir. 1990) (conditional new trial order reversed where there was "significant evidentiary basis for the jury's verdict"); *McNeal v. Hi-Lo Powered Scaffolding, Inc.*, 836 F.2d 637, 647 (D.C. Cir. 1988) (reversing new trial order where "there was substantial evidence" supporting jury verdict); *Narcisse v. Illinois Central Gulf Railroad Co.*, 620 F.2d 544, 548 (5th Cir. 1980) (new trial order reversed where jury's first verdict *"clearly within* the universe of possible awards which are supported by the evidence") (*quoting Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 670 (5th Cir. 1974) (emphasis in original)).

Again, the Roys do not address the cases that create the conflict.

Instead, the Roys cite revisionist cases that, they say, "agree" with the traditional cases on the trial courts' right to weigh evidence and credibility, and reject verdicts supported by "substantial evidence." Opp., pp. 15, 16. But even if true, those cases do not overrule or change the

revisionist cases that hold the opposite.[3] The confusion in the case law is real, and calls out for resolution by this Court.

B. The Conflict On The Scope Of Appellate Courts' Review Of New Trial Orders.

The Roys collapse trial and appellate court standards, and so dodge entirely the disparate approaches the courts of appeals take to the scope of their review of new trial orders. Opp., p. 12 n.6. The Roys announce that there is no conflict, but do not say what the supposedly uniform test is, much less come to grips with the case law that proves there is none. In fact, the standards range from "no review" in the Second Circuit to "strict scrutiny" in others, and everything in between.

The Roys discount the Second Circuit's "no review" rule, saying the Second Circuit bases its rule on "cases from the era when appellate court review was precluded by practical and statutory limitations." Opp., p. 13 n.8. But that is wrong; the seminal Second Circuit case, *Portman*, was decided after the 1933 and 1948 events that the Roys say are pivotal. *Portman v. American Home Prods. Corp.*, 201 F.2d 847 (2d Cir. 1953). Moreover, whatever the source or wisdom of the Second Circuit rule, it is the law there, and squarely conflicts with the rule applied in this case and elsewhere. As recently as January of this year, the Second Circuit reaffirmed its "no review" stance in weight-of-evidence cases:

> On appeal, however, when a new trial is sought on the ground that the jury verdict was against the weight of the evidence, "we have disclaimed the authority to review a ruling on such a motion."

---

[3] Moreover, even if revisionist courts always agreed with traditional courts on the rights of trial courts, they disagree on the scope of appellate court review. Petition, pp. 19-24. The Roys do not address that. Pp. 5-9, below.

Berkovich v. Hicks, 922 F.2d 1018, 1026 (2d Cir. 1991) (*quoting Newmont Mines, Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 133 (2d Cir. 1986).[4] The conflict could not be clearer.

There also is conflict among circuits that do review new trial orders based on weight of the evidence. The courts generally agree that a trial judge's view that a verdict is against the great weight of the evidence should be reversed only upon a showing of "abuse of discretion." But those are just words, and whether the standard the words allude to is consistent or not turns on whether the words mean the same thing in the circuits that recite them. Here, the words have very different meanings, depending on which court you are in.

In traditional courts, review for "abuse of discretion" does not include reweighing of evidence and credibility. *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987); *Patty Precision Prods. Co. v. Brown & Sharpe Mfg. Co.*, 846 F.2d 1247, 1251 (10th Cir. 1988); *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 868 (1990); *Eyre v. McDonough Power Equip., Inc.*, 755 F.2d 416, 420 (5th Cir. 1985); *Phoenix v. Com/Systems, Inc.*, 706 F.2d, 1033, 1036 (9th Cir. 1983). Petition, pp. 20-21. In contrast, in revisionist courts, review for abuse of discretion means "stringent," "strict," "rigorous" – in substance, *de novo* – review of the weight and credibility of the evidence and witnesses. *See* Petition, pp. 3-24. In fact, as a matter of logic a court cannot "strictly" review a determination that a verdict is contrary to the great weight of the evidence

---

[4] The Roys dig up an aberrant 1965 Second Circuit case that reviews a new trial order that was decided, among other grounds, on the weight of the evidence. *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532 (2d Cir. 1965). Opp., pp. 13, 20. But the Second Circuit has never cited *Berner* since for the proposition that new trial orders on weight-of-evidence grounds are reviewable in that Court, and cases decided since, including *Berkovich* decided just three months ago, confirm that *Berner* is not the law in the Second Circuit. *See* Petition, p. 21.

without reweighing the evidence itself. That is exactly what appellate courts traditionally are not supposed to do, and it is exactly what the Ninth Circuit did here; it saw its task as assessing whether the trial court was right that the jury verdict was clearly against the weight of the evidence, and so reweighed the evidence and credibility of witnesses for itself. The court concluded that the Roys' evidence was "persuasive," that the evidence was "substantially balanced," and that Volkswagen's evidence did not "preponderate." *Roy v. Volkswagen of America*, 896 F.2d 1174, 1177, 1179 (9th Cir. 1990) (App. 15B, 19B). *See* Petition, pp. 7-9.[5]

The Roys advise that the courts' common use of the words "abuse of discretion" cures the conflict. But even the Roys concede that the meaning of "abuse of discretion" is not "totally uniform." Opp., p. 21.[6] However, they propose, non-uniformity is no problem because trial courts will never know what they can do under an abuse of discretion standard anyway. *Id.* That is wrong.

---

[5] The Roys state that an appeal of the first trial now is pending and append Volkswagen's Notice of Appeal to their brief. Opp., p. 11 & App. 1a-2a. The Roys do not mention, however, that they have urged the Ninth Circuit that Volkswagen has no right to appeal, and that the appeal should be dismissed.

[6] The Roys also concede that the courts of appeal use "loose language" when drawing from JNOV cases. Opp., p. 20. The courts use more than loose language; some use the wrong standard, just as the Ninth Circuit initially did here. *Roy II*, 896 F.2d at 1179 (App. 18B-19B). *See* 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2806, p. 42 ("The matter is complicated because of the recurrent tendency on the part of courts to confuse the standard for a new trial with that for a directed verdict or a judgment notwithstanding the verdict"). Again, the Roys point to opinions that do not confuse the standards (Opp., pp. 19-20), but those cases do not change the many cases that do confuse the standards.

Although "variations are inherent in the indefinable notion of 'discretion'," Opp., p. 21, "variations" have no place in the definition of the outer limits of discretion. Discretion has limits; "abuse" of discretion means the limits have been exceeded; the question is what the limits are. Indeed, the observation that appellate courts' rulings are not uniform because variations are "inherent" in "discretion" discloses the Roys', and the Ninth Circuit's, fundamental error; trial courts have discretion, but appellate courts do not. The task of the appellate court is to measure the trial court's exercise of discretion against a rule of law defining the discretion's limits. Where the Roys themselves concede that the cases define no clear limits, the Roys make a compelling case for review.

As to prejudice, even the revisionist courts do not go as far as the Ninth Circuit did here. The Roys cite no case that has reversed a trial court's judgment that the trial was "pervaded" by "emotion," that the jury was "overwhelmed" and "obviously swayed" by sympathy, and that it rendered a verdict that was a "serious miscarriage of justice." *Roy v. Volkswagen Aktiengesellschaft*, 600 F. Supp. 653, 655 (C.D. Cal. 1985) (App. 6A, 7A). And they cite no case that called – as the court did here – for record "evidence" of prejudice.[7] Nor is such evidence called for.

---

[7] The Roys quibble that the trial court found no "prejudice," only "sympathy." Opp., p. 18 n.11. But "sympathy" that "overwhelms" and "obviously sways" a jury, and leads it to a "serious miscarriage of justice," is prejudicial. *Roy I*, 600 F. Supp. at 655 (App. 6A-7A). The Roys also say "evidence" was necessary because the court's assessment of jury sympathy was a "conclusory statement." Of course the trial court "concluded" that the jury was overwhelmed by sympathy; "for these reasons" it ordered a new trial. *Roy I*, 600 F. Supp. at 655 (App. 6A-7A). That decision was based on first-hand observation, which a cold record cannot provide. Moreover, the second jury's verdict is powerful "evidence" that sympathy, not the facts on defect and causation, drove the first verdict. The Roys say nothing about that.

A trial court's finding of jury prejudice comes from its first-hand observation of juror reactions – averted eyes, tears, wide-eyed stares, disinterest in important evidence – that do not appear on the printed record. Courts of appeals necessarily cannot – and so should not – second-guess such a finding.[8] Surely it would be counterproductive to have trial courts interrogate jurors as to their decision-making process, in order to develop record evidence of what prejudiced and swayed them.

In sum, the split between the traditional and revisionist approaches is real, and leads to disparate results in like cases. Trial courts have no guidance, and parties increasingly are litigating second trials, only to have them mooted by overzealous courts of appeal bent on *de novo* review of facts. For example, of the cases the parties here cited from the 1980s, more new trial grants were reversed than affirmed. That is not "authority confided *almost entirely* to the exercise of discretion on the part of the trial

---

[8] The Roys suggest that the jury prejudice was Volkswagen's fault. But the Ninth Circuit did not say that (although urged to by the Roys), and for good reason. Volkswagen objected to all evidence of injuries when it moved to bifurcate; when the motion was denied, it became clear that the "horrible" evidence would come in. Volkswagen showed the child's burns to the jury in voir dire to try to defuse in some way the powerful effect plaintiffs' burn evidence inevitably would have; but obviously Volkswagen was unsuccessful. At trial, the plaintiffs' doctor undressed the child before the jury. And Judge Curtis, who did not participate in voir dire, based his assessment of prejudice solely on what he saw at trial: The jurors' reactions at trial to the "many graphic and explicit photographs" of the child's "horrible" burns, and the "many operations" he had and would need in the future. *Roy I*, 600 F. Supp. at 655 (App. 6A). Furthermore, it was the jury's extreme reaction to the evidence that was critical.

court." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980).

The Roys accuse Volkswagen of "result-oriented analysis." Opp., p. 15 n.10. To be sure, the disparate rules do compel different results on the same facts. This case is a good example; under the "no review" rule of the Second Circuit, and under the traditional rule that forbids appellate court reweighing of evidence, the result here could not happen. If it is "result-oriented" to request a uniform rule leading to uniform results on the limits of discretion, Volkswagen is guilty as charged.

The Court's attention to the problem is badly needed.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

David M. Heilbron
Leslie G. Landau
Anne O. Hanna
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

Attorney for Petitioners

McCutchen, Doyle,
Brown & Enersen
Of Counsel

Herzfeld & Rubin, P.C.
Herbert Rubin
Michael Hoenig
Ian Ceresney
Daniel Gsovski
Of Counsel

April 30, 1991